Supreme Court, U.S.
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No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WINTERTHUR REINSURANCE CORP. OF AMERICA,
Petitioner,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a lower court may confer antitrust standing upon plaintiffs who the court finds do not satisfy all the relevant standing factors set forth in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 159 (1983).

2. Whether the court of appeals' decision to confer standing on plaintiffs who did not participate in the same market as petitioner and whose injuries, if any, flowed indirectly from an alleged boycott aimed at participants in a separate market in which the plaintiffs did not purchase is consistent with fundamental antitrust policies underlying this Court's analysis in *Associated General Contractors*.

3. Whether domestic insurance companies whose conduct otherwise would be exempt from the federal antitrust laws under the McCarran-Ferguson Act lose that exemption because they participate with foreign reinsurers in the business of insurance.

4. Whether agreements among primary insurers and reinsurers on such matters as standardized advisory insurance policy forms and terms of insurance coverage constitute a "boycott" outside the exemption of the McCarran-Ferguson Act.

5. Whether state insurance departments' review and approval of proposed advisory insurance forms establish a "state action" defense to allegations under the antitrust laws that primary insurers and reinsurers conspired as to the terms of these standardized forms.

PARTIES BELOW

This action originally was brought by the States of Alabama, Arizona, California, Massachusetts, Minnesota, New York, West Virginia, and Wisconsin. The litigation subsequently was joined by the States of Alaska, Colorado, Connecticut, Louisiana, Maryland, Michigan, Montana, New Jersey, Ohio, Pennsylvania, and Washington, and by a number of private plaintiffs, 14 of which appealed from the district court's adverse decision and thus were parties in the court of appeals (Ace Check Cashing, Inc.; Acme Corrugated Box Co.; Anastasios Markos T/A Municipal Exxon; Bay Harbor Park Homeowner's Association; Bensalem Township Authority; Big D Building Supply Corp.; Carlisle Day Care Center, Inc.; Durawood, Inc.; Environmental Aviation Sciences, Inc.; Jerry Grant Chemical Associates, Inc.; Keyboard Communications, Inc.; Carmella M. "Boots" Liberto T/A R.J. Liberto, Inc.; P&J Casting Corp.; and Henry J. Rosenfeld).

The 32 defendants are: (1) four primary insurance companies: The Aetna Casualty and Surety Co.; Allstate Insurance Co.; Hartford Fire Insurance Co.; and Insurance Company of North America and its corporate parent, CIGNA Corp.; (2) Insurance Services Office, Inc. ("ISO"), a licensed property-casualty rating and advisory organization consisting of 1400 insurance companies participating in the United States; (3) six domestic reinsurance companies: Constitution Reinsurance Corporation; General Reinsurance Corporation; Mercantile & General Reinsurance Company of America; North American Reinsurance Corporation; Prudential Reinsurance Company; and Winterthur Reinsurance Corp. of America; (4) the Reinsurance Association of America ("RAA"), an association of domestic reinsurers; and (5) 17 foreign reinsurers, including two individuals: Merrett Underwriting Agency Management Limited; Three Quays Underwriting Management Limited; Janson Greene Management Limited; Edwards & Payne (Underwriting Agencies) Lim-

ited; C.J.W. (Underwriting Agencies) Limited; Murray Lawrence & Partners; Oxford Syndicate Management Limited; D.P. Mann Underwriting Agency Limited; J. Brian Hose and Others, Ltd.; Unionamerica Insurance Co., Ltd.; CNA Re (U.K.) Ltd.; Terra Nova Insurance Co., Ltd.; Excess Insurance Company Limited; Kemper Re (U.K.) Ltd.; Continental Reinsurance Co. (U.K.) Ltd.; Robin A.G. Jackson; and Peter N. Miller; and (6) one domestic and two foreign reinsurance brokers: Thomas A. Greene & Co., Inc.; Ballantyne, McKean & Sullivan, Ltd.; and R.K. Carvill & Co., Ltd.

The petitioner herein is the Winterthur Reinsurance Corp. of America, a domestic reinsurance corporation. A separate petition is being filed by the domestic primary insurance entities, their licensed rating organization, the domestic reinsurers (other than Winterthur), and the trade association of the domestic reinsurers. A third petition is being filed by the foreign reinsurers and related individuals.

RULE 29.1 STATEMENT

Winterthur Reinsurance Corp. of America has no subsidiaries. 100% of its stock is owned by Winterthur U.S. Holdings, Inc. The stock of Winterthur U.S. Holdings, Inc. is held in trust by the Bank of New York for the beneficial owner, Winterthur Swiss Insurance Co.

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PETITION FOR A WRIT OF CERTIORARI

Winterthur Reinsurance Corp. of America hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 938 F.2d 919 (9th Cir. 1991). The opinion of the district court (App. B) is reported at 723 F. Supp. 464 (N.D. Cal. 1989).

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1991. Timely petitions for rehearing were denied on October 15, 1991 (App. C). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15, in pertinent part provides:

> . . . [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 16 of the Clayton Act, 15 U.S.C. § 26, in pertinent part provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . .

STATEMENT OF THE CASE

These consolidated civil actions were filed by nineteen state attorneys general and numerous private parties against a group of defendants consisting of insurance companies, reinsurance companies, brokers, and others. The actions charge that the defendants violated federal antitrust and state laws by engaging in conspiracies to restrict the availability of commercial general liability insurance and reinsurance, causing injury to insurance consumers, like the plaintiffs.

Petitioner Winterthur Reinsurance Corp. of America ("Winterthur") is a domestic reinsurance company that, along with other defendant reinsurance companies, is alleged to have refused to sell reinsurance to other insur-

ance companies. Neither Winterthur nor any of the other "reinsurer" defendants is alleged to have sold or refused to sell insurance to any of the plaintiffs. Similarly, no plaintiff is alleged to have purchased or attempted to purchase reinsurance. Nevertheless, plaintiffs were deemed to have antitrust standing to sue Winterthur and the other reinsurer defendants.

1. *Background.* According to plaintiffs' allegations, comprehensive general liability insurance ("CGL") is insurance that protects the insured against the risk of liability to third parties for bodily injury or property damage. It is purchased by businesses, nonprofit organizations, and government entities. So-called "primary insurers" provide CGL insurance directly to insureds, like the plaintiffs. So-called "reinsurers" (such as petitioner) provide reinsurance only to other insurance companies (both primary insurers and reinsurers). Reinsurers do not provide CGL insurance policies to plaintiffs or other consumers.

CGL insurance policies are written primarily on standard policy forms that are developed by the Insurance Services Office, Inc. ("ISO"), an association of more than one thousand primary insurers, which files such standardized forms with state insurance departments. Plaintiffs allege that the defendant primary insurers became dissatisfied with existing ISO forms for CGL insurance. These primary insurers allegedly sought to have the ISO forms modified to limit coverage to "claims made" during the policy term, and to eliminate coverage for accidental pollution claims. To achieve this goal, they allegedly pressured ISO to amend the standard CGL forms and induced defendant reinsurers to refuse to provide reinsurance to insurers writing CGL policies on existing ISO forms. Ultimately, ISO amended its standard CGL forms.

2. *The Complaints.* Commencing in 1988, nineteen state attorneys general [1] and numerous private entities

[1] The attorneys general sued on behalf of their respective states and classes of state governmental agencies, and as *parens patriae*

filed complaints seeking treble damages and injunctive relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. These complaints alleged that defendants had engaged in various conspiratorial acts designed to restrict the scope of CGL insurance coverage in the new ISO forms.[2]

The complaints describe several distinct insurance markets. First, the complaints allege a primary CGL insurance market; in that primary market, the plaintiffs are the buyers and the primary insurers are the sellers. Cal. Cmplt., ¶¶ 4(j), 24; Conn. Cmplt., ¶¶ 4(o), 39. Winterthur does not sell CGL insurance in the primary insurance market. Cal. Cmplt., ¶ 19; Conn. Cmplt., ¶ 17.

The complaints also allege as a separate market the "reinsurance" market, where reinsurers (like Winterthur) sell reinsurance to other insurance companies. Cal. Cmplt., ¶¶ 4(o), 26; Conn. Cmplt., ¶¶ 4(p), 40. "Only insurance companies purchase reinsurance." Cal. Cmplt., ¶ 26; See Conn. Cmplt., ¶ 4(p). Plaintiffs do not claim to have participated in the reinsurance market.[3]

Winterthur is alleged to have conspired with certain other defendants (i) to restrict the terms on which *reinsurance* would be offered to insurance companies and

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on behalf of the general welfare and economy of their respective states.

[2] The state complaints fell into two groups, depending on when they were filed. The so-called "first wave" complaints were patterned after the March 22, 1988 complaint filed by the State of California (hereinafter, "Cal. Cmplt."); the so-called "second wave" complaints were patterned after the June 14, 1988 complaint filed by the State of Connecticut (hereinafter, "Conn. Cmplt."). The private complaints are substantially identical to the states' complaints. In all cases, the plaintiffs sued as purchasers or potential purchasers of CGL insurance policies from primary insurers.

[3] Yet another market described in the complaints is the "retrocessional" reinsurance market. Retrocessional reinsurance is reinsurance provided by one reinsurer to another reinsurer. Cal. Cmplt., ¶ 107; Conn. Cmplt., ¶ 4(r).

(ii) to refuse to provide *reinsurance* coverage unless ISO amended its proposed CGL policy forms. Cal. Cmplt., ¶¶ 113, 123; Conn. Cmplt., ¶¶ 117, 122. Although the defendant primary insurers are named as alleged participants in the conspiracy claims involving Winterthur, Winterthur is alleged only to have engaged in unlawful acts in the *reinsurance* market.

3. *The District Court's Decision.* The various actions were consolidated in the United States District Court for the Northern District of California under MDL No. 767. Defendants moved to dismiss all the actions on the grounds, *inter alia*, that the McCarran-Ferguson Act and the state action doctrine conferred antitrust immunity on defendants. In addition, Winterthur and other reinsurer defendants moved to dismiss the claims against them on the ground that plaintiffs lacked standing under the antitrust laws to complain of actions allegedly taken in the reinsurance market. The district court—without engaging in the antitrust standing analysis mandated by *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983) —ruled that plaintiffs did have standing to sue. App. at 65a-67a. However, the district court granted the motion of all defendants to dismiss the action based on the state action and/or McCarran-Ferguson Act defenses. *Id.* at 58a, 63a.

4. *The Court of Appeals' Decision.* By opinion dated June 18, 1991, the U.S. Court of Appeals for the Ninth Circuit reversed and remanded the judgment of dismissal. *Id.* at 1a-32a. In its opinion, the court of appeals upheld the district court's ruling that the plaintiffs had antitrust standing to sue the reinsurer defendants.[4] *Id.* at 14a-17a.

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[4] One aspect of the court of appeals' ruling on standing requires clarification. The opinion states that "domestic reinsurers concede the presence of the factors that establish standing." App. at 17a. Winterthur is a domestic reinsurer, but it did not concede standing in the court of appeals. See Brief of Appellees at 6 n.3 & 89 n.86.

In concluding that plaintiffs had standing to sue the reinsurer defendants, the court of appeals reviewed what it characterized as "the five factors set out in *Associated General Contractors*." App. at 15a. *First*, the court elevated into a factor the "specific intent of the alleged conspirators," and ruled that the "reinsurer defendants are alleged to have intended to restrict the kinds of insurance available to the plaintiffs." *Id. Second*, although acknowledging that the alleged conduct of the reinsurers "took effect through the primary insurers," the court nevertheless ruled that the alleged injury to plaintiffs could be termed "direct." *Id.*

With regard to the *third* factor under *Associated General Contractors*—the "character of the damages"—the court expressed more doubt. It acknowledged that "the proof may be complex." App. at 15a. Nevertheless, while "the character of the damages is against standing," the court concluded that "the net balance as to damages is in favor of standing." *Id.* at 16a.

The *fourth* factor identified by the court was the existence of other, more appropriate plaintiffs. The court acknowledged that the "primary insurers who were denied reinsurance could have brought suit," but opined that they were "unlikely to desire" to do so. *Id.* The court concluded that "[r]ealistically, no more appropriate class of plaintiffs exists." *Id.*

As to the *fifth* factor—the nature of plaintiffs' injury—the court first observed that "a plaintiff who is 'neither a competitor nor a consumer' in the relevant market does

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In fact, Winterthur filed a joinder to the petition for rehearing in the court of appeals that expressly noted: "Contrary to the panel's statement, Winterthur, a domestic reinsurer, does not concede the presence of the factors that establish standing." Joinder in Petition for Rehearing and Suggestion for Rehearing *En Banc* at 2. It is possible that the court may have erroneously considered Winterthur a foreign reinsurer rather than a domestic reinsurer. See App. at 8a. In any event, the court indicated that—as to standing—"[t]he foreign reinsurers have no characteristics that distinguish them from the domestic reinsurers." *Id.* at 17a.

not suffer 'antitrust injury.'" *Id.* The court nonetheless ruled that plaintiffs—as "consumers" of CGL insurance —should have standing to sue for any violation that "choked off" competition without regard to whether the affected competition was in the market where the plaintiffs were consumers. *Id.*

The court concluded that because "[a]lmost all" of the *Associated General Contractors* factors supported standing, "the plaintiffs have standing to maintain this antitrust suit against all defendants." App. at 16a, 17a.

REASONS FOR GRANTING THE PETITION

Summary of Argument

1. The test for antitrust standing set forth in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), is currently being applied in divergent ways by the circuit courts. This Court should clarify the parameters of the *Associated General Contractors* test, and thereby eliminate the confusion that is reflected in the lower courts' application of that test.

The doctrine of antitrust standing has long been a quagmire. Prior to 1983, a slew of rigid, contradictory rules had been developed by the circuits to govern the scope of standing under Section 4 of the Clayton Act. In 1983, however, this Court handed down its decision in *Associated General Contractors* in order to establish a uniform, policy-based test for determining whether an antitrust plaintiff has standing to sue.

In *Associated General Contractors*, this Court expressly refused to embrace any of the numerous tests for antitrust standing that were then being used by the lower courts. Instead, this Court instructed lower courts to analyze the issue of standing "in light of the factors" set forth in its opinion. 459 U.S. at 536 n.33. These

factors are: (i) whether plaintiff's alleged injury is of the type that the antitrust laws were intended to forestall, (ii) whether plaintiff's injury was the "direct" result of the alleged antitrust violation, (iii) whether the damages alleged are speculative, (iv) whether there is a potential for duplicative recovery or complex apportionment of damages; and (v) whether there are other potential plaintiffs who are more direct victims of the alleged violation. 459 U.S. at 538-45.

Key questions were left unanswered by the decision in *Associated General Contractors*, however. The Court did not indicate whether an antitrust plaintiff must satisfy *all* the factors set forth in *Associated General Contractors* to have standing under Section 4 of the Clayton Act, or whether standing could be achieved by a plaintiff who merely satisfies *some* of these factors. Furthermore, if all of the *Associated General Contractors* factors did not have to be satisfied by a plaintiff, this Court provided little guidance as to how much weight should be given to each of the factors.

In the nine years since *Associated General Contractors*, these lingering questions have not been answered uniformly by the lower courts. Inconsistency has once again surfaced in the circuit courts' application of the test for antitrust standing.

The court of appeals below concluded that the plaintiffs had standing to sue petitioner despite the fact that plaintiffs had *not* satisfied all of the standing requirements set forth in *Associated General Contractors*. The court's decision to confer standing on the plaintiffs apparently reflects the Ninth Circuit's view that *Associated General Contractors* permits a court to find that antitrust standing exists where there are "some factors tending in favor of standing" and "some against." *See, e.g., Los Angeles Memorial Coliseum Comm'n* v. *National Football League*, 791 F.2d 1356, 1363 (9th Cir. 1986); *accord Eagle* v. *Star-Kist Foods, Inc.*, 812 F.2d 538, 543 (9th Cir. 1987).

Other circuits, however, appear to have construed the *Associated General Contractors* standing test differently. Several cases in the Fifth Circuit, for example, have ruled that antitrust standing may be denied where *one* of the *Associated General Contractors* factors is not satisfied, without any assessment of the remaining factors. *E.g.*, *Bell* v. *Dow Chem. Co.*, 847 F.2d 1179, 1183-84 (5th Cir. 1988); *Campbell* v. *Wells Fargo Bank, N.A.*, 781 F.2d 440, 443 (5th Cir.), *cert. denied*, 476 U.S. 1159 (1986). The Eleventh Circuit has gone even further, concluding that standing may be denied if "[o]ther factors not spelled out" in *Associated General Contractors* indicate that the plaintiff is "not a proper plaintiff for antitrust purposes." *Todorov* v. *DCH Healthcare Auth.*, 921 F.2d 1438, 1452 (11th Cir. 1991). The Sixth Circuit also appears to have concluded that the list of factors set forth in *Associated General Contractors* is not an "exhaustive" list. *See Pinney Dock & Transp. Co.* v. *Penn Cent. Corp.*, 838 F.2d 1445, 1462 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988).

The issue of how to apply the *Associated General Contractors* standing test has been percolating in the lower courts for nine years, yet the circuits remain out of sync. This Court should definitively resolve the issue of whether all the factors enumerated in *Associated General Contractors* must be met for a plaintiff to have antitrust standing, or whether a lower court is free to determine the relative weight to assign to each factor.

2. Moreover, even if—as a general matter—each lower court may strike a balance among the *Associated General Contractors* factors, the "balance" struck by the court of appeals in this case cannot be reconciled with fundamental antitrust policies embraced by this Court in *Associated General Contractors*. While nominally reciting relevant factors set forth in *Associated General Contractors*, the court of appeals erroneously included one factor, placed undue weight on certain factors, and improperly discounted other factors.

First, the *Associated General Contractors* Court did not identify "specific intent" as one of the factors governing antitrust standing. Indeed, it made clear that an allegation that the defendant specifically intended to harm the plaintiff is "insufficient as a matter of law" to confer antitrust standing. 459 U.S. at 545. Nevertheless, the court of appeals relied upon the specific intent of the alleged conspirators to harm the plaintiffs as the first factor favoring standing in this case. App. at 15a.

Second, the court of appeals recognized that under *Associated General Contractors*, "a plaintiff who is 'neither a competitor nor a consumer' in the relevant market does not suffer 'antitrust injury.'" App. at 16a. Nevertheless, constricting this principle to an unnatural degree, the court ruled that *Associated General Contractors* favors standing for consumers in one market (*i.e.*, primary insurance sales) who sue defendants in a *different* market (*i.e.*, reinsurance sales). In effect, the court of appeals ruled that consumers always have standing because "[t]he antitrust laws are intended to preserve competition." App. at 16a. To compound this error, the court elevated this one factor above all others, stating that it had "tremendous significance." *Id.*

Third, despite the fact that the court of appeals conceded that another, more direct, class of plaintiffs (*i.e.*, primary insurers) could have sued the reinsurers, and that the alleged action of the reinsurers "took effect through the primary insurers," the court of appeals nevertheless concluded that the "directness" of the alleged injury favored standing. *Id.* at 15a. By granting standing despite its recognition that proof of damages "may be complex," and despite the fact that there exists a potential for "duplicative recovery," the court of appeals effectively discounted a critical aspect of antitrust standing analysis—namely, "the strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits." 459 U.S. at 543.

I. THE DECISION BELOW REFLECTS THE CONTINUED CONFUSION AMONG CIRCUIT COURTS AS TO THE PROPER ANALYSIS OF ANTITRUST STANDING UNDER *ASSOCIATED GENERAL CONTRACTORS*

By its literal terms, Section 4 of the Clayton Act purports to confer standing upon "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15. Although "[o]n its face, § 4 contains little in the way of restrictive language," *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979), this Court has refused to read the statutory language literally to allow suit by any person whose injuries "might conceivably be traced to an antitrust violation." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972). Rather, "despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable." *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 760 (1977) (Brennan, J., dissenting); *accord Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 477 (1982).

The lower federal courts have long struggled to formulate a practical test for determining which plaintiffs should have standing to sue under the antitrust laws. By 1983, a slew of divergent doctrines had been developed for this purpose. Under the so-called "direct injury" test, standing was denied to any plaintiff whose injury was remote or consequential. *E.g.*, *Productive Inventions, Inc.* v. *Trico Prods. Corp.*, 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956). Under the "target area" test, a plaintiff had antitrust standing only if he was "within that sector of the economy" endangered by a breakdown of competition. *E.g.*, *Pan-Islamic Trade Corp.* v. *Exxon Corp.*, 632 F.2d 539, 547 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981). The Sixth Circuit adopted a "zone of interests" test, which required antitrust plaintiffs to prove that their injuries were

"within the zone of interests protected by" the antitrust laws. *Malamud* v. *Sinclair Oil Corp.*, 521 F.2d 1142, 1152 (6th Cir. 1975). By contrast, the Third Circuit in essence concluded that each case must be analyzed in terms of its own peculiar facts. *Cromar Co.* v. *Nuclear Materials & Equip. Corp.*, 543 F.2d 501, 506 (3d Cir. 1975).

The end result, according to one notable commentary, was a "decisional morass," lacking any "analytical framework that could make order out of the chaos." Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809, 840 (1977). It was into this morass that this Court stepped in 1983 to try to provide such a framework, with its decision in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983). Rejecting the existing tests that had developed within the circuits, this Court instead sought to identify the controlling factors that should be used by lower courts to circumscribe their decisions on antitrust standing. By setting forth these factors—each of which was rooted in sound antitrust policy—the Court sought to eliminate the "contradictory and inconsistent results" that were being produced under the prevailing law. *Id.* at 536 n.33.

Under the new analytical framework adopted by the Court in *Associated General Contractors*, an antitrust plaintiff could not obtain standing simply by alleging a causal connection between the antitrust violation and his injury and by further alleging that the defendant intended to cause that injury. 459 U.S. at 537. Rather, "[a] number of other factors may be controlling":

> (i) whether the plaintiff's asserted injury generally "is of the type that the antitrust statute was intended to forestall" and more particularly, whether plaintiff is a consumer or competitor in the relevant market;

(ii) whether the plaintiff's asserted injury is a direct result of the alleged restraint;

(iii) whether the plaintiff's damages claim is speculative;

(iv) whether there is a potential for complex apportionment of damages or for duplicative recovery; and

(v) whether there are other, more direct plaintiffs who might sue.

See 459 U.S. at 538-45.

The *Associated General Contractors* decision sought to replace the tangled web of contradictory standing tests used by the lower courts with an orderly, uniform framework for analysis. Yet in the nine years since the decision was handed down, it has in fact given rise to new analytical inconsistencies among lower courts.

As the Eleventh Circuit has succinctly observed, "[t]he Court's approach in *Associated General* has bred much confusion in the lower federal courts." *Todorov* v. *DCH Healthcare Auth.*, 921 F.2d 1438, 1451 n.20 (11th Cir. 1991); *see also* Comment, *The Need for An Express Test to Determine Antitrust Standing*, 1985 J. Corp. L. 123, 138 (1985) ("Continued reliance by the lower courts on broad language such as that set out in *Associated General Contractors* will perpetuate the confusion and inconsistency that plagues the antitrust standing area"). As a result, lower courts continue to reach different standing results based on substantially similar factual patterns.

The problem in large part stems from this Court's directive to lower courts in *Associated General Contractors* to analyze antitrust standing "in light of" the specific factors set forth in that opinion. 459 U.S. at 536 n.33. In handing down this directive, however, the Court left two interrelated questions unanswered:

(1) Must a plaintiff satisfy all of the *Associated General Contractors* factors, or may a lower

court confer standing on plaintiffs who only meet *some* of the factors;

(2) If all the factors need not be satisfied, is each of the *Associated General Contractors* factors to be accorded equal weight, or may a lower court decide to accord greater weight to some factors (and if so, which ones).

The court of appeals below believed that it could confer standing upon a plaintiff who did *not* satisfy all the factors set forth in *Associated General Contractors*. It expressly so stated in its conclusion that "[a]lmost all of the *Associated General Contractors* factors point to the presence of standing." App. at 16a. Moreover, with regard to the "third factor" (*i.e.*, damages), the court conceded that "the proof may be complex." *Id.* at 15a. The court also acknowledged the existence of a class of more direct plaintiffs (*i.e.*, primary insurers), although the court discounted this factor because it opined that such potential plaintiffs were "unlikely" to bring suit. *Id.* at 16a.

In proceeding under its assumption that a plaintiff could have antitrust standing without meeting all of the *Associated General Contractors* factors, the court below adopted the view that appears to prevail in the Ninth Circuit. For example, in *Los Angeles Memorial Coliseum Commission* v. *National Football League*, 791 F.2d 1356, 1363 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987), the court observed that "most cases will find some factors tending in favor of standing . . . and some against . . . and a court may find standing if the balance of factors so instructs." *See also Bhan* v. *NME Hosps., Inc.*, 772 F.2d 1467, 1470 n.3 (9th Cir. 1985) ("the Supreme Court did not explicitly state that a plaintiff must satisfy all of the *Associated General Contractor* factors . . ."); *R.C. Dick Geothermal Corp.* v. *Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989) ("No single factor is decisive. The court must balance the factors. . . .").

In contrast, a number of decisions in the Fifth Circuit have come to the conclusion that failure by a plaintiff to satisfy one or more of the *Associated General Contractors* factors may constitute sufficient grounds for denying standing and may obviate the need to assess the other factors. For example, in *Bell* v. *Dow Chemical Co.*, 847 F.2d 1179, 1183-84 (5th Cir. 1988), the court affirmed the denial of antitrust standing to the plaintiff solely on the ground that its damage claim was "speculative," without attempting to balance this shortcoming against any of the other *Associated General Contractors* factors. Similarly, in *Campbell* v. *Wells Fargo Bank, N.A.*, 781 F.2d 440, 443 (5th Cir.), *cert. denied*, 476 U.S. 1159 (1986), the court denied standing to the antitrust plaintiffs on the sole ground that the plaintiffs' injuries were "not a direct consequence" of the defendant's conduct. Because of the plaintiffs' failure to satisfy this one factor, the court concluded "that there is no need to decide whether the plaintiffs' injuries are determinable and whether recovery for them would be duplicative. . . ." *Id.*[5]

If standing may be achieved despite a plaintiff's failure to satisfy all the *Associated General Contractors* factors, then a second critical issue was also left unanswered by *Associated General Contractors*—*i.e.*, should some of the factors be given greater weight than other factors. *As-*

[5] The Eleventh Circuit appears to read *Associated General Contractors* as imposing additional burdens on plaintiffs, concluding that antitrust standing might be denied to a plaintiff who meets all the *Associated General* requirements. In that circuit, "[o]ther factors not spelled out by the Supreme Court also may be relevant" to the antitrust standing decision. *Todorov* v. *DCH Healthcare Auth.*, 921 F.2d 1438, 1452 (11th Cir. 1991). "For example, a court should consider whether the plaintiff can enforce an antitrust judgment efficiently and effectively; if not, then the plaintiff may not be a proper plaintiff for antitrust purposes." *Id. See also Pinney Dock & Transp. Co.* v. *Penn Cent. Corp.*, 838 F.2d 1445, 1462 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988) (the *Associated General* "list of factors is not exhaustive").

sociated General Contractors gives lower courts little guidance as to how to weigh each factor. The court of appeals below clearly did not accord each factor equal weight. Indeed, the court singled out the "fifth factor" (*i.e.*, whether plaintiffs were "competitors or consumers") as the one factor entitled to "tremendous significance." App. at 16a. The court of appeals also appeared to minimize the importance of the factor concerning the complexity of damages, and effectively to disregard the threat of duplicative recovery. *Id.* at 15a-16a.

Other circuits, in contrast, appear to accord considerably greater weight to the factors relating to damages than did the court below. *See, e.g., Pinney Dock & Transp. Co.* v. *Penn Cent.*, 838 F.2d 1445, 1463-64 (6th Cir.), *cert denied*, 488 U.S. 880 (1988) (standing denied to direct competitor of defendant on claims where damages were "extremely complex" and other direct victims existed). As previously noted, the Fifth Circuit has denied antitrust standing to plaintiffs based solely upon the fact that the damage claims were speculative. *See Bell*, 847 F.2d at 1183-84. Similarly, the D.C. Circuit has concluded that the "guiding principle" of antitrust standing analysis is "to exclude as plaintiffs those whose suits might 'undermine[] the effectiveness of treble-damages suits' "—*i.e.*, plaintiffs with damage claims that are "remote" or threaten "multiple recoveries." *Adams* v. *Pan Am. World Airways, Inc.*, 828 F.2d 24, 26 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 961 (1988) (quoting *Associated General Contractors*, 459 U.S. at 545); *cf. Associated General Contractors*, 459 U.S. at 545 n.52 ("the remote and obviously speculative character of [plaintiff's] harm is plainly sufficient to place it beyond the reach of § 4").[6]

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[6] Indeed, even before *Associated General Contractors* was decided, the Second Circuit had denied standing to a competitor of the defendant where the claim of damages was unduly speculative. *Reading Indus., Inc.* v. *Kennecott Copper Corp.*, 631 F.2d 10, 13-14 (2d Cir. 1980), *cert. denied*, 452 U.S. 916 (1981).

For the most part, circuit decisions do not make clear what weight is being accorded to each of the relevant factors in the *Associated General Contractors* list. Instead, taking to heart this Court's broad directive to analyze standing "in light of" the factors set forth in *Associated General Contractors*, lower courts have tended to engage in ad hoc assessments in which the relative importance of the individual factors is never discussed. *See, e.g.*, Taylor, *Antitrust Standing: Its Growing—Or More Accurately Its Shrinking—Dimensions*, 55 A.B.A. Antitrust L.J. 515, 526 (1986) ("the courts are not at all consistent with one another or even internally consistent within a given court as to the relative significance that should be accorded the various factors set forth in *Associated General*"). Lower courts, like the court of appeals below, appear to believe that they have great latitude to determine that a given factor is of "tremendous" significance—or of virtually no significance at all.

When this Court decided *Associated General Contractors* nine years ago, its ostensible goal was "to implement uniformity among the circuits" in the area of antitrust standing. *Southaven Land Co.* v. *Malone & Hyde, Inc.*, 715 F.2d 1079, 1085 (6th Cir. 1983). That goal has not been achieved. The decision of the court of appeals below may be reflective of the approach that the Ninth Circuit has taken concerning antitrust analysis, but it does not reflect a uniform approach among lower courts. Like the court of appeals below, courts today exercise virtually unfettered discretion in weighing and discounting the factors governing antitrust standing analysis—as well as importing other factors that might be relevant to the issue.

This Court has waited long enough for the circuits to come to a consensus on the key issues left open by *Associated General Contractors*. Certiorari should be granted to determine whether the approach to antitrust standing used by the court below is the correct one.

II. THE COURT OF APPEALS' STANDING ANALYSIS IS INCONSISTENT WITH ANTITRUST POLICIES UNDERLYING THE *ASSOCIATED GENERAL CONTRACTORS* ANALYSIS

Even if there were complete uniformity in lower courts' interpretation of *Associated General Contractors*, the decision below should nevertheless be reviewed because the court of appeals' application of the so-called "five factors set out in *Associated General Contractors*" is inconsistent with fundamental antitrust policies that served as the foundation for *Associated General Contractors*. If allowed to stand, the court of appeals' decision will encourage lower courts to pay lip service to the factors governing standing under Section 4 of the Clayton Act,[7] while actually frustrating the policy goals that these factors are meant to serve.

a. *Intent.* According to the court of appeals, the first factor that "favors standing" is the claim that the "reinsurer defendants are alleged to have intended to restrict the kinds of insurance available to the plaintiffs." App. at 15a. Yet *Associated General Contractors* confirmed that "[t]he availability of the § 4 remedy . . . is not a question of the specific intent of the conspirators." *Associated General Contractors*, 459 U.S. at 537 (quoting *Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 479 (1982)). Indeed, in *Associated General Contractors*, this Court ruled that "an allegation of intent to harm the [plaintiff]" is "insufficient as a matter of law" to sustain a finding of antitrust standing, even when combined with a claim of consequential harm resulting from a violation of the antitrust laws. 459 U.S. at 545; *see also Adams* v.

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[7] Plaintiffs also seek injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26. As this Court made clear in *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 109-13 & n.6 (1986), the standing analysis under Section 16 of the Clayton Act will largely coincide with the analysis under Section 4 of the Clayton Act, with the exception of those factors relating to damage calculations.

Pan Am. World Airways, Inc., 828 F.2d 24, 26 n.4 (D.C. Cir. 1987) *cert. denied*, 485 U.S. 961 (1988) (rejecting argument that "the defendant's specific intent to injure plaintiff is also a factor in the proper-plaintiff analysis").

No sound antitrust policy is furthered by allowing the treble damage remedy under Section 4 of the Clayton Act to hinge upon the vagaries of claims of intent and motivation. As this Court has repeatedly observed, the treble damage remedy was meant to vindicate the public's interest in antitrust enforcement. The availability of a remedy under Section 4 of the Clayton Act should be determined by *public* policies, such as whether a suit will promote or undermine the effectiveness of the treble damages remedy. The availability of a Section 4 remedy should not depend upon whether the alleged injury to the plaintiff was "intended." By making "intent" an express factor in antitrust standing analysis, the court of appeals has strayed from the antitrust policies underlying *Associated General Contractors*.

b. *Directness of the Injury.* The reinsurer defendants, including petitioner Winterthur, did not sell insurance to plaintiffs. As the plaintiffs themselves alleged, reinsurers sell reinsurance *only* to other insurance companies. *E.g.*, Cal. Cmplt., ¶ 26; Conn. Cmplt., ¶ 4(p).

Plaintiffs alleged that petitioner and other domestic reinsurers conspired with certain other defendants "to restrict the terms on which *reinsurance* would be offered for CGL risks and to refuse to provide *reinsurance* coverage for CGL risks." App. at 12a (emphasis added). In short, plaintiffs allegedly suffered an *indirect* injury caused by the reinsurers' refusal to offer reinsurance to primary insurers. By their own allegations, plaintiffs were not injured by the alleged refusal of reinsurers to offer reinsurance to primary insurers; plaintiffs' claim is that they were injured by the actions that primary insurers took *in response to* the alleged boycott by reinsurers. It strains credulity to characterize plaintiffs' al-

leged harm in the *primary insurance* market as the direct result of the reinsurers' alleged boycott in the *reinsurance* market.

The court of appeals recognized that "the action of the reinsurers took effect through the primary insurers. . . ." App. at 15a. Yet the court nevertheless concluded that the "injury alleged was direct." *Id.* This conclusion cannot be reconciled with *Associated General Contractors.* In *Associated General Contractors*, this Court ruled that a labor union suffered an "indirect" injury when the defendants coerced certain contractors not to do business with unionized firms. Similarly, any injury suffered by plaintiffs here was the result of the conduct of the primary insurers who were allegedly coerced by the reinsurers. To call such injury "direct" is tantamount to deleting this factor from the *Associated General Contractors* calculus.[8]

c. *Character of the Damages.* As noted in *Associated General Contractors*, this Court has a "strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits." 459 U.S. at 543.

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[8] The indirect nature of the injury allegedly caused by Winterthur and other domestic reinsurers is not changed by the fact that plaintiffs alleged that defendant primary insurers joined in the conspiracy with the domestic reinsurers. The reinsurers are alleged to have refused to offer reinsurance to non-defendant primary insurers who utilized the objectionable ISO forms. The alleged participation by defendant primary insurers (*i.e.*, as inducers of this boycott in the reinsurance market) does not alter the fact that any effects in the primary insurance market (where plaintiffs are consumers) were indirect, as described above. Similarly, the indirect nature of plaintiffs' injury is not cured by the fact that the "second wave" complaints include one count alleging a "general" conspiracy (which attempts to merge all the alleged conspiracies into one and which includes all defendants). This "general" conspiracy count, like the other counts, is based on factual allegations that the defendant reinsurers refused to offer *reinsurance* to the primary insurers, in the *reinsurance* market. Here, too, any injury to plaintiffs was the indirect result of the reinsurers' alleged refusal to offer reinsurance to primary insurers.

Thus, in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), this Court held that indirect purchasers could not sue under Section 4 of the Clayton Act to recover damages for price overcharges that had been passed on to them by their suppliers (who purchased directly from the price-fixing conspirators). Cases like *Illinois Brick* have "stressed the importance of avoiding either the risk of duplicative recoveries on the one hand, or the danger of complex apportionment of damages on the other." *Associated General Contractors*, 459 U.S. at 543-44. A claim for damage that is "remote" and "speculative" is "plainly sufficient to place it beyond the reach of § 4." *Id.* at 545 n.52.

The court of appeals below gave short shrift to the problems posed by complex theories of damages. While acknowledging that "the proof [of damages] may be complex," the court effectively discounted the importance of damage complexity and judicial manageability in the antitrust standing analysis. Yet in fact, the problems posed by complex damages proof in this case may be even more formidable than the problems in *Illinois Brick*. Because different insurance and reinsurance contracts are used at each market level, there is not even a "chain of distribution" through which a single "product" makes its way from reinsurers to plaintiffs. Any attempt by plaintiffs to prove that they were injured by conspiracies affecting reinsurance sales will require the fact finder to unravel the impact of decisions made by scores of independent, primary insurers to obtain (or forgo) reinsurance. Tracing and apportioning plaintiffs' damage claims in this context will likely pose obstacles comparable to those that resulted in dismissal of plaintiffs' claims in *Illinois Brick*.[9]

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[9] The court of appeals appeared to discount totally the risk of duplicative recovery with regard to those "claims in which the primary insurers are charged together with the reinsurers," because "all of the defendants would be jointly and severally liable if the charges are true." App. at 15a-16a. This reasoning cannot with-

d. *Existence of Other, More Appropriate Plaintiffs.* The court of appeals conceded that "[t]he primary insurers who were denied reinsurance could have brought suit." App. at 16a. Yet under *Associated General Contractors*, "[t]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement" weighs heavily against allowing more remote parties to bring suit. 459 U.S. at 542. The court of appeals discounted the possibility that these direct victims might sue, speculating that because the primary insurers in ISO "caved in" to the alleged coercion of the reinsurers, primary insurers are "unlikely" to bring suit. App. at 16a.

Such speculation is difficult to reconcile with the analysis of this Court in *Associated General Contractors*. In *Associated General Contractors*, this Court concluded that the "immediate victims of coercion by defendants" could sue the defendants, and therefore the indirect victims had no standing. 459 U.S. at 541. The fact that no direct victims had actually filed suit in *Associated General Contractors* did not lead this Court to conclude that they were intimidated, as the court of appeals concluded here. Instead, this Court concluded that the lack of suits by direct victims "shed doubt on the proposition that these 'victims' were actually harmed at all." *Id.* at 542 n.47. Primary insurers, it should be remembered, include many large and powerful companies. If a lower court is free to speculate that direct victims like these are too intimidated to protect their rights in court, then lower courts will be free to confer standing upon any indirect victim, simply by speculating that direct victims are unlikely to sue.

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stand analysis. There are well over a thousand primary insurers nationwide, and only four of these primary insurers were named as defendants. Winterthur faces a risk of duplicative recovery if a non-defendant primary insurer were to file suit based on the same conduct challenged by plaintiffs below.

e. *The Nature of Plaintiffs' Claimed Injury.* Finally, addressing the factor which it deemed to be of "tremendous significance," the court of appeals observed that a "plaintiff who is 'neither a competitor nor a consumer' in the relevant market does not suffer 'antitrust injury.'" App. at 16a. However, the court went on to conclude that "plaintiffs were consumers of CGL insurance" and that "as consumers [they] have alleged antitrust injury." *Id.*

In coming to this conclusion, the court stretched the boundaries of the consumer/competitor category well beyond its intended scope. By plaintiffs' own allegations, plaintiffs were not consumers in the relevant market—*i.e.*, the market for sales of reinsurance to other insurance companies. There are no factual allegations of anticompetitive conduct by the reinsurer defendants in the relevant market where plaintiffs are consumers—*i.e.*, the primary insurance market. In short, while plaintiffs were indeed "consumers," they were *not* consumers in the reinsurance market, where petitioner (and other reinsurers) allegedly engaged in unlawful conduct.

As this Court has noted in other contexts, "an antitrust policy divorced from market considerations would lack any objective benchmarks." *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 53 n.21 (1977). The court of appeals' application of this factor similarly lacks any benchmark, because every plaintiff can be characterized as a "consumer" or a "competitor." The relevant issue, however, should be whether the plaintiff is a consumer or competitor *in the market where the defendants allegedly acted unlawfully. Cf. Exhibitors' Serv., Inc.* v. *American Multi-Cinema, Inc.*, 788 F.2d 574, 579 (9th Cir. 1986) ("While it is true that the two firms compete, the requirement laid down in *Associated General Contractors* is that the plaintiffs and conspirators compete in the 'market in which trade was *restrained*'") (quoting 459 U.S. at 539) (emphasis in original); *De Atucha* v. *Commodity Exch., Inc.*, 608 F.

Supp. 510, 517-18 (S.D.N.Y. 1985) (silver futures customer in London silver market lacked antitrust standing to sue alleged manipulators of silver futures in United States market). Petitioner is alleged only to have refused to sell in the reinsurance market; no plaintiff was a consumer in *that* market.

It should not be enough for a lower court to simply identify the factors set forth in *Associated General Contractors* and then proceed to "apply" those factors without due regard for the antitrust policies they were meant to advance. Yet that is what the court of appeals has done in this case. The decision below should be reviewed to ensure that the factors governing the critically important issue of antitrust standing are being properly applied in the lower courts.

III. THIS PETITION SHOULD ALSO BE GRANTED TO RESOLVE THE QUESTIONS PRESENTED HEREIN RELATING TO WHETHER THE CONDUCT ALLEGED IS EXEMPT FROM THE ANTITRUST LAWS

With regard to Questions 3, 4, and 5 stated under "Questions Presented," *supra* at (i), Winterthur adopts and incorporates by reference the arguments included in the Petition for a Writ of Certiorari filed in this case by Hartford Fire Insurance Co., *et al.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 89-16405, 89-16513 to 89-16531

IN RE INSURANCE ANTITRUST LITIGATION

ACE CHECK CASHING, INC.; ACME CORRUGATED BOX COMPANY, INC.; ANASTASIOS MARKOS, t/a MUNICIPAL EXXON; BAY HARBOR PARK HOMEOWNER'S ASSOCIATION, INC.; BENSALEM TOWNSHIP AUTHORITY; BIG D BUILDING SUPPLY CORPORATION, *et al.*,

Private Plaintiffs,
Plaintiffs-Appellants,

and

STATE OF ALABAMA, *et al.*,

Plaintiffs,

v.

AETNA CASUALTY AND SURETY COMPANY; ALLSTATE INSURANCE COMPANY; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY, *et al.*,

Defendants-Appellees.

STATE OF CALIFORNIA; CITY OF LAFAYETTE; CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SAN BENITO,

Plaintiffs-Appellants,

and

STATE OF ALABAMA, *et al.*,

Plaintiffs,

v.

AETNA CASUALTY AND SURETY COMPANY; ALLSTATE INSURANCE COMPANY; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY, *et al.*,

Defendants-Appellees.

STATE OF CALIFORNIA; CITY OF LAFAYETTE; CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SAN BENITO,
Plaintiffs-Appellants,

v.

INSURANCE SERVICES OFFICE, INC., CNA RE (U.K.) LTD.; CONTINENTAL REINSURANCE CORPORATION; UNION-AMERICA INSURANCE CO.; EDWARDS & PAYNE LTD.; EXCESS INSURANCE CO., LTD.; GENERAL REINSURANCE CORP.; THOMAS A. GREENE & COMPANY, INC.; KEMPER REINSURANCE LONDON; LLOYD'S UNDERWRITERS & BROKERS; MERCANTILE & GENERAL REINSURANCE COMPANY OF AMERICA; NORTH AMERICAN REINSURANCE CORPORATION; OXFORD SYNDICATE MGMT. LTD.; (sued herein as K.F. ADLER & OTHERS (U.A.) LTD.); PRUDENTIAL REINSURANCE; REINSURANCE ASSOCIATION OF AMERICA; TERRA NOVA INSURANCE CO.; AETNA CASUALTY AND SURETY COMPANY; ALLSTATE INSURANCE COMPANY; WINTERTHUR REINSURANCE CORPORATION OF AMERICA; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY,
Defendants-Appellees.

STATE OF NEW YORK; ROOSEVELT ISLAND OPERATING AUTHORITY; VILLAGE OF GROTON; VILLAGE OF LAKE SUCCESS,
Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; *et al.*,
Defendants-Appellees.

COMMONWEALTH OF MASSACHUSETTS; TOWN OF HANOVER; TOWN OF MILFORD,
Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; *et al.*,
Defendants-Appellees.

STATE OF MINNESOTA,
Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; *et al.*,
Defendants-Appellees.

STATE OF WEST VIRGINIA; CITY OF CLAY; COUNTY OF HANCOCK; COUNTY OF MINERAL; COUNTY OF WIRT,
Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; *et al.*,
Defendants-Appellees.

STATE OF WISCONSIN,
Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; *et al.*,
Defendants-Appellees.

CITY OF MOBILE; STATE OF ALABAMA;
CITY OF BIRMINGHAM,
Plaintiffs-Appellants,

v.

AETNA CASUALTY AND SURETY COMPANY; WINTERTHUR REINSURANCE CORPORATION OF AMERICA; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE,
Defendants-Appellees.

STATE OF ARIZONA,
Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

STATE OF MARYLAND,
Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

STATE OF WASHINGTON; COUNTY OF COWLITZ,
Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,

Defendants-Appellees.

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,

Defendants-Appellees.

STATE OF COLORADO,

Plaintiff-Appellant,

v.

WINTERTHUR REINSURANCE CORPORATION OF AMERICA; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE,

Defendants-Appellees.

STATE OF OHIO; TOWNSHIP OF JACKSON; COUNTY OF HARDIN,

Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,

Defendants-Appellees.

STATE OF CONNECTICUT,
Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

COMMONWEALTH OF PENNSYLVANIA; COUNTY OF SCHUYLKILL; CITY OF ALTOONA; CITY OF YORK; BOROUGH OF CHAMBERSBURG,
Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

STATE OF ALASKA,
Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

STATE OF MONTANA; COUNTY OF TETON,
Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,

Defendants-Appellees.

STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,

Defendants-Appellees.

STATE OF LOUISIANA, CITIES OF BATON ROUGE, NEW ORLEANS, SLIDELL, NACHITOCHES AND EUNICE,

Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California

Argued and Submitted March 15, 1991

Decided June 18, 1991

Before BEEZER and NOONAN, Circuit Judges, and SINGLETON,* District Judge.

NOONAN, Circuit Judge:

Nineteen states and numerous private parties brought antitrust suits against the defendants named above. These suits were consolidated in the district court and were ultimately dismissed. The plaintiffs appeal. We reverse the district court and remand.

FACTUAL BACKGROUND

The undisputed facts are set out by the district court in *In re Insurance Antitrust Litigation*, 728 F.Supp. 464, 468-70 (N.D. Cal. 1989). We summarize:

Commercial general liability insurance (CGL) protects the insured against the risk of liability to third parties for bodily injury or property damage. It is purchased by businesses, nonprofit entities, and governmental units. Defendants Hartford Fire Insurance Company (Hartford), Allstate Insurance Company (Allstate), Aetna Casualty and Surety Company (Aetna), and CIGNA Corporation (CIGNA) are sellers of CGL.

In distinction from these primary insurers, there are reinsurers to whom the primary insurers turn to share the risk. The terms and availability of reinsurance directly affect the terms and availability of primary insurance. In turn, retrocessional insurance—insurance for reinsurers—has an impact on the terms of reinsurance and primary insurance. The defendant reinsurers in this case are domestic—*e.g.*, General Reinsurance Corporation (General Re)—and also foreign. The foreign defendant companies include one Swiss corporation, Winterthur Swiss Insurance Company (Winterthur); and six "London Company Market" corporations, all of them subsidi-

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* The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

aries of American corporations: Terra Nova Insurance Co., Ltd. (Terra Nova); Unionamerica Insurance Co., Ltd. (Unionamerica); Continental Reinsurance Co., (U.K.) Ltd. (Continental Re); Excess Insurance Group, Ltd. (Excess); Kemper Reinsurance London, Ltd. (Kemper Re); and CNA Re (U.K.) Ltd.

Reinsurance is arranged by specialized brokers and underwriters. Much reinsurance is done by syndicates doing business through Lloyd's of London. A variety of defendants here are underwriters for these reinsurance syndicates—*e.g.*, Merrett Underwriting Agencies Management, Ltd. (Merrett) and Three Quays Underwriting Management Ltd. (Three Quays). Thomas A. Greene and Co., Inc. (Greene) is an American reinsurance broker, a defendant here. Ballantyne, McKean and Sullivan, Ltd. (Ballantyne) and R. K. Carvill & Co., Ltd., (Carvill) are London reinsurance brokers, defendants here. There are also individual defendants associated with reinsurance—*e.g.*, Peter North Miller, the chairman of the Council of Lloyd's, its governing body; and Robin A. G. Jackson, chief underwriter for Merrett.

Two insurance associations are also defendants. One is Reinsurance Association of America (RAA), which principally engages in lobbying. The other is the Insurance Service Office (ISO). ISO has a key role in the regulation of insurance by the several states. Formed in 1971 by the merger of eleven insurance rating bureaus, ISO is an association of over fourteen hundred property and casualty insurers. It develops standard forms of policies. It collects statistical data and estimates risks relevant to the forms. In those states where regulators formally approve the forms, ISO presents the forms for approval.

In 1984, Hartford expressed its dissatisfaction with the standard ISO form for CGL insurance. In particular, Hartford was displeased with the way the form insured against "occurrences" of liability during the life of the policy. Such insurance had "a long tail," *i.e.*, years after

the policy had expired, a claim might be made upon it for an occurrence during the life of the policy. Hartford wanted a "claims made" form to replace the "occurrences" form. Under a "claims made" form only claims made during the life of the policy would be paid. Hartford also objected to coverage of liability for accidental pollution in the standard CGL form.

Led by Hartford, the defendant primary insurers exerted concerted pressure on ISO to get it to withdraw its form for CGL insurance. In June 1984 Hartford persuaded major American reinsurers to agree to boycott the ISO form. Hartford, Aetna, Allstate and CIGNA then joined forces to persuade key underwriters at Lloyd's to agree to boycott the form. The defendants used reinsurance brokers to convey their message. Leading underwriters in London responded to the American request by threatening a boycott of insurance written on the form. ISO began to retreat. In September 1984 ISO agreed to the unprecedented presence of domestic and foreign reinsurers at its executive committee meeting of September 20, 1984. Four reinsurance underwriters from Lloyd's conveyed their insistence on Hartford's terms. Change the form or get no reinsurance was their theme. ISO responded by eliminating accidental pollution coverage and by approving a claims made form with a date after which claims could not be filed. ISO also continued to offer a CGL occurrence form.

The reinsurance defendants continued to press for elimination of the occurrence form. They announced, publicly and privately, that there would be no reinsurance for primary insurers writing on the occurrence form, and they refused to renew long-standing reinsurance treaties with primary insurers in the United States unless they agreed to abandon the occurrence form. As a result of the reinsurers' actions, primary insurers were precluded from selling long tail insurance and also from selling accidental pollution insurance. Whether these varieties of insurance disappeared entirely is not clear; what is alleged is that

their availability was substantially diminished. In most states where a regulatory state agency approved insurance forms, ISO obtained approval of its new CGL form. Thereafter, ISO withdrew its data collection and risk-estimation support for the pre-1984 form.

In late 1985 Hartford and Aetna took the lead in urging ISO to develop standard forms for two other types of CGL insurance: umbrella and excess. With the cooperation of Merrett, Three Quays and Allstate, these standard forms were prepared and approved by ISO.

London reinsurers including Unionamerica, Terra Nova, Excess, Kemper Re and Continental Re, plus the Lloyd's underwriters Merrett and Edwards and Payne agreed to boycott reinsurance and insurance policies for United States property seepage and pollution exposures. The agreement is memorialized in the "Non Marine London Market Agreement 1987," signed by over forty retrocessional reinsurers at Lloyd's and the London Company Market. The parties to the agreement agreed to accept retrocessional reinsurance only from reinsurers who signed a letter of intent stating the following:

> We hereby agree that we will use our best endeavours to ensure that all U.S.A. and Canadian exposed insurance/reinsurance business attaching on or after 1st January 1987 will only be written where the original business includes a seepage and pollution exclusion clause wherever legal and applicable.

The effect of this agreement was to deny insurance consumers in the United States property coverage for seepage and pollution.

The Markets

As the plaintiffs have presented their case, the markets affected by the defendants' conduct are (1) the market in the United States for CGL insurance, (2) the market in the United States for excess and umbrella CGL insurance,

(3) the market in the United States for property insurance, (4) the market in the United States and the United Kingdom for reinsurance, and (5) the market in the United Kingdom for retrocessional insurance.

The Suits

The complaint filed by California is representative of the claims of Alabama, Arizona, California, Massachusetts, New York, West Virginia, and Wisconsin. In its first claim, California alleges that the American reinsurer defendants; the four primary insurer defendants; Winterthur; and Greene conspired in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, to restrict the terms on which reinsurance would be offered for CGL risks and to refuse to provide reinsurance coverage for CGL risks unless ISO agreed to amend its 1984 CGL forms. In its second claim, California alleges that named Lloyd's underwriters; the four primary insurer defendants; and the brokers Greene and Carvill conspired to the same effect. In the third claim, California alleges that the Lloyd's underwriters; the four primary insurers; the American reinsurers; Winterthur; and Greene and Carvill conspired to the same effect.

In its fourth claim, California includes as defendants RAA and ISO together with the primary insurers; the Lloyd's underwriters; the American reinsurers; Winterthur; and Greene and Carvill. California charges them with conspiracy to eliminate pollution coverage and retroactive coverage from the 1984 claims-made form of ISO.

California's fifth claim is against five named Lloyd's underwriters; against Peter Miller and Robin A. G. Jackson; and against the London reinsurance broker Ballantyne, charging them with violation of section 1 of the Sherman Act by conspiracy to restrict the terms on which reinsurance would be provided for CGL risks; to refuse to reinsure CGL risks written on an occurrence form; and to eliminate reinsurance on long-tail risk covered by occurrence policies.

The sixth claim for relief names the Lloyd's underwriters; London company reinsurers, Unionamerica, Terra Nova, and CNA Re; and London reinsurance broker Ballantyne as conspirators to violate the Sherman Act by restricting the terms on which CGL reinsurance would be provided and by limiting the availability in the United States of pollution coverage.

In the seventh claim California charges ISO; Aetna, Allstate and Hartford; and the underwriters Merrett and Three Quays with violating the Sherman Act by agreeing to, and promulgating, model forms for umbrella and excess insurance.

The eighth claim of California is that the six named London Company reinsurers plus Merrett conspired to restrict the terms on which property insurance and reinsurance coverage would be provided for North American risks.

The ninth to eleventh claims of California are for violations of state law—of, respectively, the Cartwright Act, California Business and Professional Code, § 16720 et seq.; the Unfair Trade Practices Act, California Insurance Code, § 790 et seq.; and the Unfair Competition Act, California Business and Professions Code § 17200 et seq. No defendants are named in these claims but it is asserted that all of the conspiracies federally charged violated the three state laws invoked here.

The complaint of Connecticut is representative of complaints filed after the California complaint by Alaska, Colorado, Connecticut, Louisiana, Maryland, Michigan, Minnesota, Montana, New Jersey, Ohio, Pennsylvania, and Washington. There is substantial overlap between the California and Connecticut complaints. Connecticut, however, in its first claim charges all of the defendants with violation of section 1 of the Sherman Act "by a conspiracy with the purpose and with the effect of shrinking the scope of CGL property/casualty insurance and reinsur-

ance and retrocessional reinsurance in connection therewith."

PROCEEDINGS

In March 1988 eight plaintiff states filed California-style complaints. In June 1988 ten additional states filed Connecticut-style complaints. Louisiana later joined this group, and Minnesota amended its complaint to conform to the Connecticut style. Various private plaintiffs joined in; all but two—from Illinois and Florida—were from states that were already plaintiffs.

The defendants filed five motions asking the district court to dismiss the suits for failure to state a cause of action or, in the alternative, to grant summary judgment. On October 10, 1989 the district court gave judgment for the defendants for reasons that will be taken up *infra*. Doing so, the district court treated its action as dismissal for failure to state a cause of action or, in the alternative, as summary judgment for the defendants. The district court accepted all the facts alleged by the plaintiffs and stated that there were "no factual disputes material to this ruling." *In re Insurance Antitrust Litigation*, 723 F.Supp. at 491.

Thereafter the plaintiffs moved to amend, and the district court denied the motion, observing: "The plain fact is that plaintiffs seek to recover on a theory that, as heretofore explained at length, will not stand under the law." *Id.* at 490.

The plaintiffs appeal.

ANALYSIS

Standing

The domestic and foreign reinsurers challenged the plaintiffs' standing to bring an antitrust suit against them. The district court ruled in the plaintiffs' favor. *In re Insurance Antitrust Litigation*, 723 F.Supp. at

482-83. The foreign reinsurer defendants press their position on this appeal.

Standing in the sense challenged depends on whether Congress in the Sherman Act intended to protect the kind of interest asserted by the plaintiffs. *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir.1989). To answer this question we look at the five factors set out in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537-45, 103 S.Ct. 897, 908-12, 74 L.Ed.2d 723 (1983).

First: The Specific Intent of the Alleged Conspirators. The reinsurer defendants are alleged to have intended to restrict the kinds of insurance available to the plaintiffs. This factor favors standing.

Second: The Directness of the Injury. "Directness" in the antitrust context means "close in the chain of causation." *R.C. Dick*, 890 F.2d at 147. Accepting as we must the plaintiffs' allegations as true, there is a close connection between the conduct of the reinsurer defendants, domestic and foreign, and the damages suffered by the plaintiffs. As the district court found, "the direct effect" of the reinsurers' action was "to restrain the availability of desired coverages in the markets in which plaintiffs purchase insurance." *In re Insurance Antitrust Litigation*, 723 F.Supp. at 483. That the action of the reinsurers took effect through the primary insurers does not lessen the directness of these consequences which followed so closely upon the challenged conduct. The injury alleged was direct. This factor favors standing.

Third: The Character of the Damages. According to their claims, plaintiffs suffered by having to pay more for the insurance they wanted. Although the proof may be complex, it would appear that they could prove how much extra they had to pay. In the claims in which the primary insurers are charged together with the reinsurers, all of the defendants would be jointly and sever-

ally liable if the charges are true. In the claims in which the reinsurers alone are defendants, there will be a problem of allocating the damages caused by the reinsurers as distinct from the damages caused by the primary insurers, and there is a danger of duplicative recovery. To the extent of this problem and this damage, the character of the damages is against standing; but the net balance as to damages is in favor of standing.

Fourth: The Existence of Other, More Appropriate Plaintiffs. The primary insurers who were denied reinsurance could have brought suit. The theoretical possibility that such entities could have sued must be discounted by the power the allegations attribute to the London reinsurers. The 1400 members of ISO could not withstand this power. As they caved in to it, they are unlikely to desire to challenge it in court. Consumers of insurance are not subject to this restraint. Realistically, no more appropriate class of plaintiffs exists.

Fifth: The Nature of the Plaintiffs' Claimed Injury. The fifth factor is "of tremendous significance." *R.C. Dick*, 890 F.2d at 148, quoting *Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1470 n. 3 (9th Cir.1985). For example, a plaintiff who is "neither a competitor nor a consumer" in the relevant market does not suffer "antitrust injury." *R.C. Dick* at 148.

In contrast, plaintiffs here were consumers of CGL insurance. As consumers, they participated in the market said to have been restrained. The antitrust laws are intended to preserve competition. They are intended to preserve competition for the benefit of consumers in the market in which competition occurs. When competition is choked off, it is the consumers who suffer. The plaintiffs here as consumers have alleged antitrust injury.

The Balance. Almost all of the *Associated General Contractors* factors point to the presence of standing against all of the defendants. By not challenging the plaintiffs'

standing on this appeal, the defendant primary insurers and the domestic reinsurers concede the presence of the factors that establish standing. The foreign reinsurers have no characteristics that distinguish them from the domestic reinsurers. As the district court determined, the plaintiffs have standing to maintain this antitrust suit against all defendants.

Standing as Parens Patriae

That a state as *parens patriae* may sue to redress a violation of the antitrust laws is well-established. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 450-51, 65 S.Ct. 716, 722-23, 89 L.Ed. 1051 (1945) (conspiracy in violation of antitrust laws is a wrong "of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected.") There must, of course, be antitrust injury for an injunction to be granted. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-16, 107 S.Ct. 484, 488-92, 93 L.Ed.2d 427 (1986). Each state here asserts its "quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general." *Alfred L. Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592, 607, 102 S.Ct. 3260, 3269, 73 L.Ed.2d 995 (1982). That interest makes each state "more than a nominal party." *Id.* The state's interest in preventing harm to its citizens by antitrust violations is, indeed, a prime instance of the interest that the *parens patriae* can vindicate by obtaining damages and/or an injunction. *Id.* at 605, 102 S.Ct. at 3268.

The McCarran-Ferguson Act Defense

The district court dismissed the claims of the plaintiffs because of the McCarran-Ferguson Act immunity of the defendants. We look at the plaintiffs' allegations, accepting them as the district court did as true, to see if McCarran immunity is present.

The McCarran-Ferguson Act provides that no act of Congress "shall be construed to invalidate" any state

law enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b) (1988). Two relevant exceptions are added: The Sherman Act "shall be applicable to the business of insurance to the extent that such business is not regulated by the State law." *Id.* Moreover, "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." *Id.* § 1013(b).

For the immunity to apply, therefore, the defendants must be in the business of insurance; that business must be regulated by state law; and the defendants must not have agreed to boycott, coerce, or intimidate or performed an act of boycott, coercion or intimidation.

The Business of Insurance

The district court correctly found that the first condition was met: the defendants are in the business of insurance. Reinsurance and retrocessional insurance are as much the business of insurance as the offering of primary insurance. *In re Insurance Antitrust Litigation*, 723 F.Supp. at 473. Although the plaintiffs made an issue of this question in the district court, they do not seriously argue it on this appeal.

State Regulation

Do the states regulate the conduct complained of here? The district court observed that the complaints filed by the states alleged violation of state law as well as violation of the Sherman Act. The district court concluded that these allegations were "self-defeating." *Id.* at 475. The states had wounded their case mortally by asserting that the defendants were liable to state regulation.

By the same token, it could be observed, the defendants by their McCarran-Ferguson Act defense conceded that their business was subject to regulation by the states, and

the foreign defendants thereby undermined their claim that comity barred their being subject to American regulation. The district court recognized that the position of the foreign defendants was inconsistent but did not feel bound to resolve the inconsistency, treating the defendants' pleas as alternatives: they won either because they were subject to state regulation or, because of comity, they were subject to no American regulation. *Id.* at 479.

What is sauce for the goose is sauce for the gander. If defendants are to be read as offering inconsistent alternatives, so are the plaintiffs to be read. Pleading of one alternative does not destroy the foundation of the other alternative. Neither side is trapped by its pleadings.

More fundamentally, established law blocks regulation by one state of the United States of the insurance business outside the borders of that state. A state's regulation of insurance does not have extraterritorial effect within the United States. *See FTC v. Travelers Health Ass'n*, 362 U.S. 293, 298-99, 302, 80 S.Ct. 717, 720-21, 722, 4 L.Ed.2d 724 (1960). The court commented on the legislative history of the McCarran-Ferguson Act and concluded from H.R.Rep. 143, 79 Cong. 1st Sess. 3, which cited *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832; *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346, 43 S.Ct. 125, 67 L.Ed. 297; and *Connecticut General Insurance Co. v. Johnson*, 303 U.S. 77, 58 S.Ct. 436, 82 L.Ed. 673 that a state does not have power to regulate in any way contracts of insurance or reinsurance entered into outside its jurisdiction even though the risks covered were risks within the state. *Id.* 362 U.S. at 300-01, 80 S.Ct. at 721-22. The Court summed up the legislative history: "There was no indication of any thought that a State could regulate activities carried on beyond its own borders." *Id.* at 300, 80 S.Ct. at 721.

A fortiori, regulation by the fifty states of foreign reinsurers is beyond the jurisdiction of the states. J. At-

wood and K. Brewster, *Antitrust and American Business Abroad* (2d ed. 1981) 1, 78. All of the arguments eloquently put by the London defendants in their objection to the application of the Sherman Act to their business apply fifty times over to the regulation of it by the individual states. State insurance schemes "do not, and could not, purport to regulate the bulk of international insurance transactions." *Id.* Consequently, McCarran-Ferguson Act immunity does not attach to the foreign defendants. By the same token, the claims by the states against the foreign defendants alone under state insurance laws (referencing the fifth, sixth, and eighth California claims) must be dismissed as seeking to exercise extraterritorial jurisdiction.

A different question is presented by the primary insurers, the American reinsurers, and the American insurance brokers, all of whom are subject to regulation by the states and therefore prima facie immune. The question is whether the action of these domestic defendants in combination with the foreign defendants is subject to state regulation. The states argue that it is not. They invoke the principle that "an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231, 99 S.Ct. 1067, 1083, 59 L.Ed.2d 261 (1979). Membership of an exempt entity in a conspiracy with nonexempt entities makes the exempt entity liable. *Beltz Travel Service, Inc. v. International Air Transport Assoc.*, 620 F.2d 1360, 1366-67 (9th Cir.1980). The domestic defendants offer no rebuttal to these authorities. We conclude that the domestic defendants' immunity was lost when they conspired with the foreign defendants.

Boycotts

A second, independent ground exists why the McCarran-Ferguson Act defense does not work for any of the defendants. The Sherman Act applies to persons or companies in the insurance business if they agreed to a boy-

cott or engaged in acts of boycott or coercion. The allegations of the plaintiffs, here accepted as true, charge agreements by the defendants to boycott nonconforming insurers and acts of boycott and coercion. No immunity for such agreements and acts exists.

The defendants' position is that they could confer and agree on the terms on which insurance would be offered; the immunity in so doing is incontestable. But they are charged with much more: with agreeing to refuse reinsurance for CGL risks unless ISO amended its 1984 CGL form; with coercing ISO and ISO members to adopt the terms the defendants wanted; with coercing primary insurers to use the claims-made form; with agreeing to exclude from all casualty and property treaty reinsurance written in London all pollution coverage for American risks. The facts underlying these allegations are asserted in some detail, including, the actions of Hartford, CIGNA, Aetna, and Allstate in 1984 in bringing pressure on the ISO staff and other ISO members; the meeting of March 2, 1984 between representatives of Hartford and representatives of General Re when they agreed to coerce ISO to accept their demand; the successful effort of General Re with RAA so that on March 26, 1984, RAA created a committee, consisting of five of the defendant domestic reinsurers, to force revision of the ISO forms of CGL insurance; the agreement of this committee on June 15, 1984 to boycott the 1984 forms, followed by a letter from RAA to ISO on June 19, 1984, stating that the members of RAA would not provide reinsurance for coverages written on the 1984 forms; the enlistment of Thomas Greene to carry this message to ISO, as he did in a speech to the ISO directors on June 21, 1984.

Hartford, Aetna, CIGNA, and Allstate—all according to allegations that here are accepted as the truth—also took the initiative to encourage a boycott of the 1984 ISO forms by the lead underwriters of North American casualty reinsurance at Lloyd's of London and used Thomas

Greene and Nick Graham of Carvill to carry the message to the London reinsurance market. As a result of these efforts, the lead underwriters, named as defendants here, met representatives of ISO at the Garrick Club in London on July 4, 1984 and indicated their resolve to eliminate the occurrence form. On September 19, 1984, at a dinner at the Board Room, a private club in New York City, a combination of representatives of the defendant domestic reinsurers and foreign underwriters communicated to ISO members their agreed demands for change. The following day ISO largely capitulated. Agreements to boycott and acts of implementation of the agreements are, in short, explicitly set forth in the complaints.

In the classic case on boycotts in the context of the McCarran-Ferguson Act, *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 98 S.Ct. 2923, 57 L.Ed.2d 932 (1978), four insurance companies entered into an agreement according to whose terms three of the companies would not sell insurance to doctors in order to force them to accept "new ground rules of coverage set by the fourth." *Id.* at 533, 98 S.Ct. at 2926. The Court found "an organized boycott" to exist, stating: "The enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott." *Id.* at 544-45, 98 S.Ct. at 2931. That is exactly what Hartford and the other defendant prime insurers did here, always accepting the plaintiffs' allegations as true: they enlisted the reinsurers to compel capitulation by ISO and the insurers who had refused to go along with the Hartford demands. The London reinsurers did similarly in denying retrocessional coverage on policies covering pollution risks.

Congress, the Court said in *St. Paul*, intended to guard against "the danger that insurance companies might take advantage of purely permissive state legislation to establish monopolies and enter into restrictive agreements fall-

ing outside the realm of state-supervised cooperative action." *Id.* at 547, 98 S.Ct. at 2933. The states allege that Hartford and its allies engaged in precisely such conduct and that the reinsurers did the same among themselves.

The Court in *St. Paul* gave prominence to the explanation of the McCarran-Ferguson Act by Senator O'Mahoney, who said the vice in the insurance industry was "a system of private government which had been built up by a small group of insurance companies, which companies undertook by their agreements and understandings to invade the field of Congress to regulate commerce." *Id.* at 548, 98 S.Ct. at 2933. That is precisely what has happened in this case, according to the plaintiffs: the defendants have gone beyond joint action to their own regulation of the terms on which CGL and property insurance will be offered.

The district court, of course, was as familiar with *St. Paul* as this court is, but placed an emphasis that we do not on the Court's statement that the boycotting insurers there would not deal with the doctors "*on any terms.*" The district court supplied italics for this phrase which is unemphasized in the Court's opinion. Compare *In re Insurance Antitrust Litigation*, 723 F.Supp. at 476, with *St. Paul*, 438 U.S. at 552, 98 S.Ct. at 2935. The issue before the Court was whether "boycott" in the McCarran-Ferguson Act meant boycotts directed against policyholders as well as boycotts directed at competitors. *Id* at 552, 98 S.Ct. at 2935. The Court held the term to include both kinds of boycott. The description of the boycott at issue was not made as a definition excluding from the definition refusals to deal except on the terms demanded. The evil of a boycott is not its absolute character but the use of the economic power of a third party to force the boycott victim to agree to the boycott beneficiary's terms. So the three malpractice insurers in *St. Paul* used their economic power to force doctors to

accept St. Paul's terms; so here, the defendant reinsurers and London underwriters used their economic power, their refusal to reinsure, to force ISO and its recalcitrant members to accept the terms Hartford and its allies wanted. They, if plaintiffs are correct in their allegations, engaged in a boycott.

The district court limited the term "boycott" in a second way, quoting *Feinstein v. Nettleship Co.*, 714 F.2d 928, 933 (9th Cir. 1983), *cert. denied*, 466 U.S. 972, 104 S.Ct. 2346, 80 L.Ed.2d 820 (1984): "Because [the agreement] in no way limited the doctors' ability to deal with third parties, the agreement itself is not an agreement to boycott. . . ." But this dictum is taken from its context. In *Feinstein* an agreement between a county medical association and an insurance agent led the defendant insurer to provide malpractice insurance only to members of the association. The plaintiff doctors could buy insurance from other insurers and did not contend that they were subject to a boycott; what they objected to was the "inherently coercive" power of the defendants' "monopoly power." *Id.* at 933. We observed that the plaintiffs' objection to monopoly power was an invocation of section 2 of the Sherman Act, and by its terms the McCarran-Ferguson Act gave immunity from this part of the Sherman Act. *Id.* at 933-34. *Feinstein* is patently very different from the case where boycotts are alleged by plaintiffs who say that the defendants conspired to restrict primary insurance by the reinsurers' agreement to a boycott.

Why were the charges of the complaint not as plain to the district court as they appear to be on appeal? Because the district court took the position that the insurers' and reinsurers' agreement on terms was immune and that such agreement "comprehends efforts to seek agreement by others, including those who might be unwilling to agree were it not for economic exigencies." *In re Insurance Antitrust Litigation*, 723 F.Supp. at 478.

But when "the economic exigencies" are produced by conspirators who refuse to supply reinsurance if the unwilling insurer does not agree, a boycott is in effect and is being implemented. The defendants are charged with boycotts, and the allegations, taken as true, destroy their McCarran-Ferguson Act immunity.

Excess and Umbrella Insurance. No boycotts are alleged as the defendants' modus operandi in respect to these branches of insurance. The states say that they are parts of the insurance business unregulated by the states and so not immune under McCarran. The district court held to the contrary, finding that all of the relevant states had statutes "broad enough to apply to any persons in the business of insurance." *In re Insurance Antitrust Litigation*, 723 F.Supp. at 474.

The domestic sellers of excess and umbrella insurance were, as the district court held, exempt. But they engaged in agreements—so it is stated—with the non-exempt Lloyd's underwriters, Merrett and Three Quays. Their own exemption was lost by acting in concert with non-exempt parties. *Group Life and Health Ins. Co.*, 440 U.S. at 231, 99 S.Ct. at 1083.

The State Action Defense

If the states have no regulatory authority over the foreign entities and if combination with the latter forfeits the immunity of the domestic companies, a third line of argument advanced by some defendants works even less well for them. These defendants, referring to those states whose regulatory agencies approved the revised ISO form, contend that there was not only state regulation but state action, and that therefore they have immunity under *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The relevant states, they argue, had a clearly articulated policy to displace competition with regulation when they permitted "the collective development" of insurance policy forms and actively su-

pervised the contents of the forms. The action by the states, they assert, insulates them under *Parker* entirely apart from their *McCarran* exemption.

Their argument fails because nothing in the affidavit evidence submitted by the defendants shows that the relevant states supervised or approved the boycotts used to produce agreement on the forms. The plaintiffs, the defendants object, produced no evidence countering their evidence. The plaintiffs did not need to do so: the defendants had made no showing of state action endorsing the boycotts.

The defendants are in the same position as the defendants in *St. Paul:* the policy changes desired by St. Paul were assumed by the court to have been filed with the state insurance director. The Court observed that there was no suggestion that Rhode Island, "in furtherance of its regulatory policies, authorized the concerted refusal to deal on any terms with St. Paul's policyholders." *St. Paul*, 438 U.S. at 554 n. 26, 98 S.Ct. at 2936 n. 26. We have adopted the same distinction: state approval of one activity is not state approval of a related but distinct activity. *Medic Air Corp. v. Air Ambulance Authority*, 843 F.2d 1187 (9th Cir.1988). The alleged anticompetitive conduct in the present case, as in *Medic Air Corp.*, was neither a reasonable nor necessary consequence of the conduct regulated and approved by the state. *Id.* at 1189. The agreements to refuse to reinsure were not state action.

The Connecticut Claim of a General Conspiracy. The London reinsurers challenged the claim in the Connecticut complaint that included both casualty and property insurance and the reinsurance and retrocessional insurance connected therewith. The district court observed that property insurance had not been alleged to have a connection with CGL insurance or with the market in which CGL insurance is sold. The district court there-

upon granted the motion to dismiss this claim. *In re Insurance Antitrust Litigation*, 723 F.Supp. at 484.

The district court rightly objected to a defect in this claim. The plaintiffs moved to amend. The district court denied the motion. The defendants say the motion was too late. But the district court did not deny amendment because the plaintiffs moved too late. It denied amendment because the plaintiffs' entire theory "will not stand under the law." *In re Insurance Antitrust Litigation*, 723 F.Supp. at 490. We are free to review this legal conclusion de novo. It is not consistent with this opinion. The plaintiffs' basic theory is maintainable. On remand of the case to the district court, the plaintiffs should be afforded the opportunity to amend.

Comity

A statute enacted in 1982 declares that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. § 6a (the FTAIA). But the statute immediately adds, "unless (1) such conduct has a direct, substantial, and reasonably foreseeable effect (A) on trade or commerce which is not trade or commerce with foreign nations. . . ." *Id.* The defendants contended in the district court that the FTAIA barred the plaintiffs because the conduct complained of in the London reinsurance claims related to commerce that was "wholly foreign commerce." The district court rejected this argument, holding as follows: "The subject matter of the alleged agreement, however, concerned the provision of reinsurance within the United States, and the allegations of effects in United States markets are sufficient to preclude a characterization of wholly foreign commerce." *In re Insurance Antitrust Litigation*, 723 F.Supp. at 486. By finding "the effects" sufficient to preclude application of the statute, the district court implicitly found that their impact on the commerce of the United States met the stat-

utory standard of being "direct, substantial and reasonably foreseeable."

On appeal, the London reinsurers devote a single sentence in a single footnote to restating their view that the FTAIA bars the claims directed at conduct within the London reinsurance market. These defendants offer neither evidence nor authority to provide a basis for overturning the district court's holding. We reaffirm its conclusion that the FTAIA is no bar to any of the plaintiffs' claims.

The district court, however, found that international comity forbade its exercise of its jurisdiction over the British defendants. The district court acknowledged that as to this issue its application of the FTAIA might be argued to be decisive. *Id.* at 486, n. 28. But there were no court decisions so holding. The House Report on this legislation stated that it had "no effect on the court's ability to employ notions of comity." H.R.Rep. No. 97-686 at 13 (1982), *reprinted in* 1982 *U.S. Code Cong. & Admin. News* at 2431, 2498. The district court prudently concluded that it should apply the analysis of comity set out in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir.1976) (*Timberlane I*).

On appeal, the plaintiffs renew their argument: the Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. § 6a, is dispositive. The defendants do not reply to their argument but by implication of their insistence on *Timberlane* do not concede. We strike a middle position. We do not believe a *Timberlane* analysis (see *infra*) can be unaffected by the statute. If a complaint survives the new bar of 15 U.S.C. § 6a because the conduct has "a direct, substantial, and reasonable foreseeable effect" on American commerce, it is only in an unusual case that comity will require abstention from the exercise of jurisdiction. But as the legislation does not eliminate comity, a court should look to see if the case before it is one in which comity still has a role to play.

Timberlane I was an opinion of this court written by Judge Herbert Choy which "has commanded a wide following," Atwood & Brewster, *Antitrust and American Business Abroad* 1, 162-63. As an advance upon Judge Learned Hand's exposition of the law of extraterritorial application of American antitrust law in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2nd Cir. 1945), *Timberlane* was "a major development." Atwood & Brewster, 1, 163. Rejecting the simple test of the effect of the charged conduct upon American commerce, *Timberlane* adopted "a jurisdictional rule of reason." *Timberlane I*, 549 F.2d at 613. We were to "weigh" and to "balance" the various considerations—the two metaphors indicated that a court should examine each relevant factor, assign its relative importance, and come to a conclusion by comparing the relative importance of the elements involved. We now conduct this examination and evaluation in terms of the factors enumerated by *Timberlane*.

First: The Degree of Conflict With Foreign Law or Policy. The government of the United Kingdom has filed a brief as amicus on this appeal. That brief informs us that the Lloyd's Acts 1871-1982 provide detailed regulation of the Society of Lloyd's. The regulation is supplemented by the Insurance Companies Act of 1982, which applies to most insurance companies as well. The Restrictive Trade Practice (Services) Order exempts certain insurance services from the Restrictive Trade Practices Act of 1976. See *In re Insurance Antitrust Litigation*, 723 F.Supp. at 488. The district court found that application of the antitrust laws to the London reinsurance market "would lead to significant conflict with English law and policy." *Id.* at 489. The British brief reiterates that conclusion; we do not doubt its accuracy. Such a conflict, unless outweighed by other factors, would by itself be reason to decline exercise of jurisdiction. *Timberlane Lumber Co. v. Bank of America*, 749 F.2d 1378,

1384 (9th Cir.1984) (*Timberlane II*), *cert. denied*, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985).

Second: The Nationality or Allegiance of the Parties and the Locations or Principal Places of Business of the Corporations. All of the plaintiffs are located in the United States. There is a substantial American interest in hearing their case. That interest is increased because nineteen of the plaintiffs are themselves states of the United States. The defendants named in certain counts are English or located in England. The district court found that "many of the corporate defendants," including those located in England, "are subsidiaries of American corporations and may be influenced by the allegiance of their American parents." *In re Insurance Antitrust Litigation*, 723 F.Supp. at 489. The interests of Britain are at least diminished where the parties are subsidiaries of American corporations. *United States v. Vetco, Inc.*, 691 F.2d 1281, 1289 (9th Cir.), *cert. denied*, 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981). Moreover, although some counts of the complaints have named only the English reinsurers as defendants, other counts charge them as coconspirators with American insurers. As to these counts, the interest of an American court in being able to judge claims against an American company is high. It would not make much sense to dismiss the London defendants on some counts and hold them answerable on others. On balance, the presence of the American plaintiffs, many American defendants and some American subsidiaries is a factor pointing towards the exercise of jurisdiction.

Third: The Extent to Which Enforcement by Either State Can Be Expected to Achieve Compliance. It would be unrealistic to expect a British court to enforce an American court's injunction against Lloyd's. It would not be unrealistic to expect an American court to be able to obtain compliance with its orders by the subsidiary of an American parent and to be able to affect the way the

foreign defendants conducted themselves in the United States. Damages, if awarded, could be collected from assets of the foreign defendants within the United States. The decree of an American court setting out the obligations of the American insurers would undoubtedly be effective and surely would have an impact on the way the American insurers did business with the foreign defendants. Substantial compliance, in short, could be achieved. This factor is in favor of the exercise of jurisdiction.

Fourth: The Relative Significance of Effects on the United States as Compared With Those Elsewhere. The comparison led to the ultimate dismissal of the Timberlane suit in *Timberlane II:* the effects of the conduct charged were substantial in Honduras and minimal in the United States. *Timberlane II*, 749 F.2d at 1385. The case here is just the reverse. The effects are minimal, or at any rate not large in England, and they are, as implicitly found by the district court, "direct, substantial, and reasonably foreseeable" in the United States, as to which Lloyd's does at least half of its casualty underwriting. Accepting as true the plaintiffs' allegations, the actions of the foreign defendants have had the kind of "real economic consequences" for the American economy that strongly weigh in favor of the exercise of jurisdiction. *See* Atwood and Brewster, 1, 169.

Fifth: The Extent to Which There is Explicit Purpose to Harm or Affect United States Commerce. The purpose of the agreements to boycott was to affect the insurance business in the United States. The district court thought that the purpose was "the legitimate business purpose" of reducing the defendants' exposure to certain kinds of risks. *In re Insurance Antitrust Litigation*, 723 F.Supp. at 490. Both purposes existed. But in applying the jurisdictional test it is the purpose to affect American commerce that is more important. The compliance of the charged conduct with the law of the foreign jurisdiction has already been taken into account under the first factor.

The fifth factor depends on the relation of the conduct to the United States: was it intended to have effects here? The answer in this case must be yes. So the complaints charge. The fifth factor strongly weighs in favor of the exercise of judgment.

Sixth: The Foreseeability of the Effects on American Commerce. The district court concluded that the defendants conceded that the effects were foreseeable. *Id.* As intended, the effects were, of course, foreseeable. As they were substantial, their foreseeability becomes a strong factor favoring the exercise of jurisdiction.

The Balance. A single factor points toward abstention: the conflict with a long-established British policy towards a venerable British trade, the underwriting of insurance. Every other factor—nationality, likelihood of compliance, the significance of the effects on American commerce, their foreseeability and their purposefulness—points to the appropriateness of exercising jurisdiction. Unless we were to create a kind of analogue of the McCarran-Ferguson Act for insurance business regulated by a foreign country and treat Lloyd's as immune, the district court should exercise jurisdiction. No authority warrants us in creating a special immunity for insurance regulated by Britain. Comity does not require it. Nothing overcomes the weight of the findings already made under the Foreign Trade Antitrust Improvements Act. The comity factors of *Timberlane* indicate that the court's jurisdiction of the subject matter that exists must be exercised.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. MDL 767

IN RE INSURANCE ANTITRUST LITIGATION.

Oct. 10, 1989

REVISED MEMORANDUM OF
DECISION AND ORDER

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SCHWARZER, District Judge.

I. INTRODUCTION

Nineteen states and numerous private plaintiffs have brought actions against a group of insurance companies, reinsurance companies, underwriters, brokers, and individuals, and the Insurance Services Office, Inc. ("ISO"), charging them with violations of the federal antitrust laws and state laws.[1] The charges rest on alleged conspiracies, boycotts, threats, intimidation, and other coercive conduct by defendants to restrict the availability of certain coverage under policies for commercial general liability insurance ("CGL") and property insurance. The filing of these complaints followed lengthy investigations conducted by the regulatory agencies of several states.[2]

Defendants have moved to dismiss, for judgment on the pleadings, and for summary judgment, and plaintiffs have made cross-motions. For purposes of these motions, the well-pleaded allegations of the complaints are accepted as true, and any factual disputes and inferences are resolved in plaintiffs' favor.

Copies of the Court's proposed ruling were distributed to counsel well in advance of the hearing, and the Court has considered the arguments of counsel in reaching the decision reflected in this memorandum.

II. FACTUAL BACKGROUND

CGL insurance protects the insured against the risk of liability to third parties for bodily injury or property damage. It is purchased by businesses, non-profit groups, and governmental entities. Defendants Hartford Fire In-

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[1] For a list of the parties and of the actions encompassed by this ruling, see Appendix.

[2] Moreover, under the Court's pretrial order, the parties were free to conduct discovery insofar as necessary for these motions.

surance Company ("Hartford"), Allstate Insurance Company ("Allstate"), Aetna Casualty and Surety Company ("Aetna"), and CIGNA Corporation ("CIGNA") are primary insurers who are major providers of CGL insurance.[3] CGL insurance is written predominantly on standard policy forms developed by ISO.

ISO is an association of more than one thousand property or casualty insurers, including Hartford, Allstate, Aetna, and CIGNA. It is licensed as a rating, rate service, and advisory organization in all fifty states. One of its primary functions is to develop standardized policy forms for property and casualty insurance that comply with state regulations and will be accepted by state insurance departments. On behalf of its members, ISO files standardized policy forms with state insurance departments. ISO also collects historical loss data, projects future loss trends, and calculates advisory rates for insurance.

In the late 1970s, ISO began to develop a revision of the standard CGL form then in use. In 1984, ISO filed or lodged with state insurance departments two proposed new policy forms for CGL insurance. These forms substantially modified coverage previously available to the insured. One of the forms was a "claims-made" policy under which coverage was limited to claims made during the policy period regardless of when the occurrence out of which the claim arose had taken place. This represented a reduction in the coverage available under the previous CGL policy form which was an "occurrence-based" form; under that form, the insured was covered for claims arising out of occurrences during the policy period, no matter when asserted, thus exposing insurers to so-called "long tail risks" that could arise long after the policy period. The proposed claims-made form reduced that ex-

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[3] CIGNA is a holding company having subsidiaries which are primary insurers.

posure and shifted the risk of future claims to the insured. The other proposed form was a modified occurrence policy.

These forms became the subject of widespread debate and controversy in the insurance industry. Considerable differences of opinion arose over what should trigger coverage, whether retroactivity of claims-made coverage should be limited, whether the pollution exclusion should be modified, and whether defense costs should be limited by the policy limits.

In their complaint, plaintiffs charge defendants Hartford, CIGNA, Allstate, and Aetna with engaging in a concerted effort to block adoption of the 1984 forms because those forms did not restrict coverage sufficiently. Plaintiffs allege that these defendants entered into conspiracies with certain domestic and foreign defendant reinsurance companies, underwriters, and their representatives to "boycott" the 1984 forms unless a retroactive date was added to the claims-made form and a pollution exclusion and defense cost cap were added to both forms. Plaintiffs allege that as a result of the efforts of Hartford, Allstate, Aetna, and CIGNA, certain domestic and London reinsurers threatened to "boycott" North American CGL risks unless these changes were made in the claims-made form and the occurrence form was eliminated. Also as a result of these efforts, the ISO executive committee in September 1984 voted to include a retroactive cut-off date in the claims-made policy form, to exclude pollution coverage from both forms, but to defer until later limiting defense costs, and to offer an occurrence form along with the new claims-made form.

Following this agreement, ISO, Hartford, Aetna, and representatives of the London reinsurers undertook joint efforts to promote the new forms. Reinsurers refused to accept new reinsurance business or renew old business unless the primary carrier agreed to switch to the claims-made form when available. Reinsurers also imposed "sun-

set dates" in their treaties limiting their exposure to losses on occurrence policies. Reinsurance underwriters also entered into an agreement to exclude pollution liability coverage from reinsurance treaties.

During the period from 1984 through 1986, when these events are alleged to have occurred, ISO lodged or filed the proposed forms with the insurance departments of all states. Departments in thirty-five states held public hearings and the policy terms that are the subjects of the complaints were discussed within the industry and in public forums. As a result ISO filed or lodged several revisions of its proposed forms with the state insurance departments. At the conclusion of the various states' proceedings in 1986, all of the plaintiff states and the two non-plaintiff states in which individual plaintiffs reside had approved the ISO forms with the following exceptions: Massachusetts and New Jersey disapproved them, New York approved only the occurrence form, and California and Colorado, having no procedure for approval, took no action. Thereafter ISO withdrew its data collection and risk estimation support for the pre-1984 CGL form.

In 1986, ISO and certain defendants agreed that ISO should also develop standard CGL umbrella and excess policy language. In June 1986 ISO released policy language providing for a retroactive date on claims-made policies, a pollution exclusion, and defense costs within policy limits.

Finally, in 1987 domestic and London retrocessional reinsurers [4] are alleged to have entered into an agreement regarding property insurance to use their "best endeavors to ensure that all U.S.A. and Canadian exposed [property] insurance/reinsurance business attaching on or after 1st January, 1987 will only be written where the original business includes a seepage and pollution exclusion wherever legal and applicable."

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[4] Retrocessional insurance is insurance for reinsurers.

III. THE FEDERAL LAW VIOLATIONS CHARGED

The state complaints fall into two groups depending on when they were filed. The First Wave Complaints each contain eight federal claims.[5] The Second Wave Complaints each contain six federal claims.[6] All complaints also contain pendent state law claims. The private complaints track the state complaints.

The First Claim of the Second Wave Complaints alleges a global conspiracy by all defendants in violation of Section One of the Sherman Act, 15 U.S.C. § 1,

> for the purpose and with the effect of shrinking the scope of CGL property/casuality insurance and reinsurance and retrocessional reinsurance, . . . to . . . reduce financial exposure to such risks and to increase underwriting profits therefrom.

(Conn.Compl't ¶ 117.) Plaintiffs allege that defendants used boycotts, coercion, and intimidation to limit available coverage. (*Id.* ¶ 118(a).) No corresponding claim is made in the First Wave Complaints.

The Second Claim of the Second Wave Complaints and the First through Fourth Claims of the First Wave Complaints allege a conspiracy by defendants Hartford, Allstate, Aetna, CIGNA, ISO, and certain others[7] to manipu-

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[5] First Wave Complaints were filed by Alabama, Arizona, California, Massachusetts, New York, West Virginia, and Wisconsin. Citations to First Wave Complaints are to the California complaint.

[6] Second Wave Complaints were filed by Alaska, Colorado, Connecticut, Louisiana, Maryland, Michigan, Minnesota, Montana, New Jersey, Ohio, Pennsylvania, and Washington. Citations to Second Wave Complaints are to the Connecticut complaint.

[7] The defendants named in these claims are as follows:

The Second Claim of the Second Wave Complaints alleges that defendants Robin A.G. Jackson, Merrett Syndicate, Three Quays, Janson Green, Edwards & Payne, C.J.W., Thomas A. Greene, R.K. Carvill, RAA, General Re, Constitution Re, Mercantile & General

late the ISO design process for CGL forms to limit the available coverage. Plaintiffs allege that defendants conspired to restrict the terms under which reinsurance coverage would be provided for CGL risks, to refuse to provide reinsurance unless the 1984 form were amended to incorporate defendants' terms, to coerce ISO and its members to adopt the coverage terms and exclusions agreed to by defendants, and to boycott the forms unless amended. (Conn.Compl't ¶¶ 122-123; Cal. Compl't ¶¶ 113-114, 118-119, 123-124, 128-129.)

The Third Claim of the Second Wave Complaints and the Fifth Claim of the First Wave Complaints in substance charge certain defendants [8] engaged in the reinsurance business at Lloyd's of London with a conspiracy to restrict the terms under which reinsurance coverage would be provided for CGL risks and to refuse to rein-

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Re, Prudential Re, North American Re, and Winterthur Swiss and other co-conspirators were involved. Louisiana also names INA.

The First Claim of the First Wave Complaints alleges concerted action by domestic defendants and also names RAA, General Re, Constitution Re, Mercantile & General Re, Prudential Re, North American Re, Winterthur Swiss, and Thomas A. Greene.

The Second Claim of the First Wave Complaints alleges concerted action by foreign defendants and also names Robin A.G. Jackson, Merrett Syndicate, Three Quays, Janson Greene, Edwards & Payne, C.J.W., J. Brian Hose, R.K. Carvill, and Thomas A. Greene. New York and Wisconsin do not name J. Brian Hose; Arizona does not name Robin A.G. Jackson.

The Third Claim of the First Wave Complaints alleges concerted action by domestic and foreign defendants and names the same defendants as in the First and Second Claims except for C.J.W. and J. Brian Hose.

The Fourth Claim of the First Wave Complaints alleges concerted action by domestic and foreign defendants and ISO and names the same defendants as in the Third Claim.

[8] Peter N. Miller, Robin A.G. Jackson, Merrett Syndicate, Three Quays, Janson Greene, Edwards & Payne, and Ballantyne McKean. Arizona does not name Peter N. Miller or Robin A.G. Jackson.

sure CGL risks on occurrence forms by coercion and intimidation of primary insurers, among other things. (Conn.Compl't ¶¶ 127-128; Cal.Compl't ¶¶ 133-134.)

The Fourth Claim of the Second Wave Complaints and the Sixth Claim of the First Wave Complaints in substance charge certain defendants [9] engaged in the reinsurance business at Lloyd's of London with a conspiracy to restrict the terms under which casualty reinsurance coverage would be provided for CGL risks and to limit the availability of pollution coverage in primary casualty insurance. No boycott, coercion, or intimidation is alleged. (Conn.Compl't ¶¶ 132-133; Cal.Compl't ¶¶ 138-139.)

The Fifth Claim of the Second Wave Complaints and the Eighth Claim of the First Wave Complaints in substance charge certain defendants [10] engaged in the reinsurance business at Lloyd's of London with a conspiracy to restrict the terms on which property insurance and reinsurance coverage would be provided and to limit its availability by, among other things, agreeing to boycott the provision of retrocessional insurance unless the primary insurance excluded seepage, pollution, and contamination coverage. Conn.Compl't ¶¶ 137-138; Cal.Compl't ¶¶ 148-149.)

The Sixth Claim of the Second Wave Complaints and the Seventh Claim of the First Wave Complaints charge ISO, Allstate, Hartford, Aetna, and certain other defendants [11] with a conspiracy to restrict terms and conditions under which umbrella and excess insurance would be

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[9] Merrett Syndicate, Murray Lawrence, Edwards & Payne, D.P. Mann, C.J.W., Unionamerica, Terra Nova, Oxford, CNA Re, and Ballantyne McKean. Wisconsin does not name CNA Re and does name Robin A.G. Jackson.

[10] Unionamerica, Terra Nova, Excess, Edwards & Payne, Kemper Re, Merrett Syndicate, and Continental Re. Oxford is named only in all the Second Wave Complaints except Alaska's. Wisconsin also names CNA Re.

[11] Merrett Syndicate and Three Quays. CIGNA is named only in the Second Wave Complaints. Louisiana also names INA.

available. No boycott, coercion, or intimidation is charged. (Conn.Compl't ¶¶ 142-143; Cal.Compl't ¶¶ 143-144.)

IV. THE MOTIONS BEFORE THE COURT

Defendants have filed five motions to dismiss or for summary judgment on the following grounds:

A. Asserting antitrust immunity under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 ("the McCarran Act"), all defendants have moved under Federal Rules of Civil Procedure 12(b)(6) and 56 to dismiss or for summary judgment.

B. Asserting the state action immunity doctrine, all defendants have moved under Rule 56 for summary judgment against all plaintiffs except California, Alaska, Colorado, and Montana on (a) the so-called global conspiracy claim of the Second Wave complaints, and (b) the policy form development claims.

C. Asserting lack of standing, all defendants except ISO, INA, Hartford, Allstate, Aetna, and CIGNA have moved under Rule 12(b)(6) for dismissal of all claims against them. (This motion does not encompass the claims against Merrett and Three Quays alleging an agreement in restraint of trade in the excess and umbrella insurance market.)

D. Asserting that there is "no factual allegation linking [them] in a 'global' conspiracy," foreign reinsurer defendants have moved under Rule 12(b)(6) to dismiss the global conspiracy claim of the Second Wave complaints.

E. Asserting lack of subject matter jurisdiction and international comity, foreign reinsurer and retrocessional reinsurer defendants and one broker have moved under Rule 12(b)(1) to dismiss the two claims alleging conspiracies to eliminate pollution coverage.

The States have moved to strike the defense based on the state action immunity doctrine.

V. DISCUSSION

A. THE McCARRAN-FERGUSON ACT DEFENSE

Defendants have moved for summary judgment on all federal claims on the ground that their conduct is immunized from antitrust liability by the McCarran Act. Although the primary thrust of the motion is said to be directed at those claims which are based on policy form development activities, the controlling principles apply to defendants' underwriting-related actions as well.[12] Stripped of their pejorative allegations, those claims charge a conspiracy to reduce the exposure of defendant insurers and reinsurers under CGL policies. The defendants sought to accomplish their objective by bringing about changes in standard policy language and by avoiding underwriting or reinsuring risks written on disfavored policy terms. All of this they did in large part by collective action, and it may be assumed that plaintiffs could prove a consequent lessening of competition among defendants and a diminution of options available in the market for CGL insurance, resulting in a restraint of trade.

In the absence of the McCarran Act, those allegations may well state a claim for relief under the Sherman Act. The issue raised by these motions is whether plaintiffs could prove a set of facts under those general allegations that would entitle them to relief notwithstanding the McCarran Act.

That Act states:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the sev-

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[12] Those defendants who are named in claims asserting conspiracies in connection with the reinsurance markets have also moved to dismiss on other grounds. They join in this motion as an alternate ground for dismissal. *See infra* § V.C.

> eral States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . .: Provided, That . . . the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1012.

Section 1013(b) of the Act further provides:

> Nothing contained in this chapter shall render the . . . Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

The McCarran Act created limited antitrust immunity for the business of insurance following the Supreme Court's departure, in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944), from prior holdings that insurance is not a transaction in interstate commerce. *See St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 538-39, 98 S.Ct. 2923, 2928-29, 57 L.Ed.2d 932 (1978). It was passed in response to widespread concern that the states should not be precluded from continuing to regulate and tax the insurance industry. It immunizes the business of insurance from the antitrust laws but only to the extent that it is regulated by the states and does not involve boycott, coercion, or intimidation. *See Feinstein v. Nettleship Co.*, 714 F.2d 928, 931 (9th Cir. 1983), *cert. denied*, 466 U.S. 972, 104 S.Ct. 2346, 80 L.Ed.2d 820 (1984). Like all antitrust immunities, it must, of course, be narrowly construed. *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231, 99 S.Ct. 1067, 1083, 59 L.Ed.2d 261 (1979).

The application of the McCarran Act immunity involves a three step analysis:

(1) Whether the conduct is within the scope of the business of insurance;

(2) Whether that business is regulated by the states; and

(3) Whether the conduct involves boycott, coercion, or intimidation.

(1) *The Business of Insurance*

In *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982), the Supreme Court stated the criteria for what constitutes the business of insurance for purposes of the McCarran Act as follows:

> *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

458 U.S. at 129, 102 S.Ct. at 3009.

And in *Group Life & Health Insurance Co. v. Royal Drug Co.*, the Court said:

> References to the meaning of the "business of insurance" in the legislative history of the McCarran-Ferguson Act strongly suggest that Congress understood the business of insurance to be the underwriting and spreading of risk. Thus, one of the early House Reports stated: "The theory of insurance is the distribution of risk according to hazard, experience, and the laws of averages. These factors are not within the control of insuring companies in the sense that the producer or manufacturer may control cost factors."

440 U.S. at 220-21, 99 S.Ct. at 1078 (citation omitted).

Plaintiffs do not dispute that the activities of defendants insofar as they relate to the terms and conditions of primary, excess, or umbrella insurance, are the business of insurance within the meaning of the McCarran Act. (*See* Plaintiff States' Unified Opposition Brief ("Unified Opp.") 37-40.) They contend, however, that reinsurance is not the business of insurance because it relates only indirectly to the spreading of the policyholder's risk and because, they contend, it is not an integral part of the policy relationship between the insurer and the insured. (*Id.*)

There is no authority for excluding reinsurance from the business of insurance. On the contrary, reinsurance was specifically referred to as a part of the business of insurance in the legislative history of the McCarran Act. *See* 90 Cong. Rec. A4406 (1944); 89 Cong.Rec. 6528 (1943). The Ninth Circuit applied the McCarran exemption to reinsurers as well as to the primary insurer in *Feinstein*. 714 F.2d at 930.

Plaintiffs urge an unreasonably narrow application of the *Pireno* test. Their own description establishes that reinsurance is an integral and vital part of the business of insurance. The complaints define reinsurance as "insurance for insurers." (*E.g.*, Conn.Compl't ¶ 4(p); Cal. Compl't ¶ 4(*o*).) They go on to describe reinsurance as

> a transaction whereby one insurance company, the reinsurer, agrees to indemnify another insurance company, the primary (or "ceding") insurer, for a designated portion of the insurance risks underwritten by the primary insurer. Reinsurance protects the primary insurer from catastrophic losses, and is heavily relied upon by prudent primary insurers. It also allows the primary insurer to sell more insurance than its own financial capacity might otherwise permit. Thus, the availability of reinsurance affects the ability and willingness of primary insurers to provide insurance to their customers.

(Conn.Compl't ¶ 4(p); *see also* Cal.Compl't ¶¶ 26-29, 34.)

Thus, reinsurance is no less a part of the process of underwriting and spreading risks than primary insurance. Plaintiffs' allegations rests, moreover, on the premise that the terms on which reinsurance is available affect the terms on which primary insurance is written and that the terms and availability of reinsurance directly affect the availability of insurance coverage to consumers. (Unified Opp. 13-16.) As plaintiffs' brief puts it, "by conspiracy to eliminate reinsurance for the consumer-demanded coverages, the reinsurers acted anticompetitively in reinsurance markets . . . [which] led inexorably to an injury to the States in the interrelated primary insurance markets." (*Id.* at 76.) Because reinsurance is thus an element of the policy relationship with the insured, it is part of the business of insurance. *See also SEC v. National Sec., Inc.*, 393 U.S. 453, 460, 89 S.Ct. 564, 568, 21 L.Ed.2d 668 (1960) (business of insurance includes "activities of insurance companies [that] relate . . . closely to their status as reliable insurers").

By the same logic, retrocessional insurance, which is "insurance for reinsurers" (Conn.Compl't ¶ 4(r)), is part of the business of insurance.[13]

(2) *Regulation by the States*

The condition of state regulation is satisfied by "a state regulatory scheme possess[ing] jurisdiction over the challenged practice." *Feinstein*, 714 F.2d at 933. "It is not necessary to point to a state statute which gives express approval to a particular practice." *Id.; see Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1287 (9th Cir.), *cert. denied*, 464 U.S. 822, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983); *Dexter v.*

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[13] The argument that the exemption is lost as a result of joint action with non-exempt entities is without merit. *Klamath-Lake Pharmaceutical Association v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1288 n. 12 (9th Cir.), *cert. denied*, 464 U.S. 822, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983).

Equitable Life Assur. Soc., 527 F.2d 233, 236 (2d Cir. 1975); *Lawyers Title Co. of Mo. v. St. Paul Title Ins. Co.*, 526 F.2d 795, 797-98 (8th Cir. 1975); *Ohio AFL-CIO v. Insurance Rating Bd.*, 451 F.2d 1178, 1181-84 (6th Cir. 1971), *cert. denied*, 409 U.S. 917, 93 S.Ct. 215, 34 L.Ed.2d 180 (1972); *see also* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 210.1b (Supp. 1988) (McCarran immunity distinguished from *Parker v. Brown* immunity; the former requiring only the existence of a state regulatory scheme, without regard to the intensity of state regulation).

This case involves the insurance business in twenty-one states.[14] The Ninth Circuit has held that California's scheme of regulation satisfies the McCarran Act. *Addrisi v. Equitable Assur. Soc. of the United States*, 503 F.2d 725, 728 (9th Cir. 1974), *cert. denied*, 420 U.S. 929, 95 S.Ct. 1129, 43 L.Ed.2d 400 (1975). The Court takes judicial notice of the laws of the other jurisdictions.[15] Each state has an insurance department with jurisdiction over policy forms. Sixteen of the plaintiff states and the two nonplaintiff states in which private plaintiffs reside require filing and review of policy forms, including umbrella and excess policies offered by admitted insurers. All of the states have licensed ISO and permit joint action by ISO and insurance companies with respect to policy forms. All of the states have unfair insurance trade practice statutes enabling them to proceed against conduct such as that alleged in the complaints. Although plaintiffs contend that reinsurance and umbrella and excess insurance are not regulated by the states, these statutes are broad enough to apply to any persons in the business

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[14] The nineteen plaintiff states plus Florida and Illinois, the two non-plaintiff states in which private plaintiffs reside.

[15] See Defendants' State-by-State Appendix accompanying their McCarran Act motion. The facts set forth in this paragraph have not been disputed in plaintiffs' opposition brief.

of insurance, including reinsurers.[16] These statutory schemes are sufficient to qualify under section 1012(b) of the McCarran Act. *See SEC v. National Securities, Inc.*, 393 U.S. 453, 459-60, 89 S.Ct. 564, 568-69, 21 L.Ed.2d 668 (1969) (state laws protecting or regulating, directly or indirectly, relationship between insurer and policy holder qualify); *FTC v. National Cas. Co.*, 357 U.S. 560, 564-65, 78 S.Ct. 1260, 1262, 2 L.Ed.2d 1540 (1958) (state unfair insurance advertising laws qualify); *Mackey v. Nationwide Ins. Co.*, 724 F.2d 419, 421 (4th Cir. 1984) (state unfair insurance practice laws that provide for administrative supervision and enforcement qualify).

Plaintiffs' argument that the regulatory schemes of the states do not reach the allegations of subversion of ISO's decision-making process and concerted activity to restrict the availability of coverages in the market is self-defeating. To avoid McCarran Act immunity, plaintiffs rely on allegations of boycott, coercion, and intimidation, and contend that this conduct is prohibited by the states. That prohibition is indeed contained in the unfair practice acts of each state, but the fact that it is satisfies the regulation prerequisite to immunity under section 1012.[17] *See*

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[16] Cal.Insur.Code § 790.01 is typical:

> This article applies to reciprocal and inter-insurance exchanges, Lloyds insurers, fraternal benefit societies, fraternal fire insurers, grants and annuities societies, insurers holding certificates of exemptions, motor clubs, nonprofit hospital associations, agents, brokers, solicitors, surplus line brokers and special lines surplus line brokers as well as *all other persons engaged in the business of insurance.*

(Emphasis added.)

[17] Cal.Insur.Code § 790.03(c) is typical:

> Entering into any agreement to commit, or by any concrete action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.

In re Workers' Comp. Ins. Antitrust Litig., 867 F.2d 1552, 1558-60 (8th Cir.), *cert. denied*, ——U.S. ——, 109 S.Ct. 3247, 106 L.Ed.2d 593 (1989).

Plaintiffs' argument that the standards for state action immunity under *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), should apply to the McCarran Act lacks any support. As Professors Areeda and Hovenkamp point out, if the regulatory requirements under McCarran "were to coalesce with the *Parker* requirements, the scope of the McCarran-Ferguson Act would be largely irrelevant as a practical matter." P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 210.1b, at 97 (Supp. 1988). (*See infra* § V.B.(1).) Such an interpretation would tend to nullify Congressional intent in adopting the McCarran Act.

(3) *The Exclusion of Boycott, Coercion, and Intimidation*

The States have submitted a Statement of Material Facts in support of their unified opposition brief. (Unified Opp. 6-16.) The following facts are material to this section of the opinion.

Twenty of the defendants, including primary insurers, reinsurers, brokers, and underwriters, dissatisfied with the CGL forms approved by ISO in 1984 because those forms failed to eliminate occurrence and pollution coverage, "agreed to and undertook a course of concerted action" to limit the availability of certain CGL coverages, and twelve other defendants ultimately joined in. (*Id.* at 10-11.) This course of action included the following activities. To coerce ISO into revising its 1984 CGL forms, defendant reinsurers agreed to and did announce that reinsurance would not be provided for coverage written on the 1984 form. (*Id.* at 11.) In addition, certain defendants took "coercive action" by agreeing to announce and announcing that they would not provide reinsurance on occurrence policies and would impose sunset clauses in

their coverage.[18] (*Id.* at 12.) Certain defendants took "coercive action" by agreeing to include and including a pollution exclusion in their reinsurance treaties. (*Id.* at 13-14.) Certain defendants made a "coercive statement of intention not to provide reinsurance unless the primary policy excludes all property pollution coverage." (*Id.* at 14-15.) Finally, certain defendants agreed to eliminate the same coverage from excess and umbrella policy forms. (*Id.* at 15-16.) And ISO withdrew statistical support for its 1973 form. (*Id.* at 12.)

It will be noted that plaintiffs' statement does not allege a boycott. Nor does it (or the complaints) describe conduct that "accords with the common understanding of a boycott." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 552, 98 S.Ct. 2923, 2935, 57 L.Ed.2d 932 (1978). As the Supreme Court described the conduct there in issue,

> The four insurance companies that control the market in medical malpractice insurance are alleged to have agreed that three of the four *would not deal on any terms with the policyholders* of the fourth. As a means of ensuring policyholder submission to new, restrictive ground rules of coverage, St. Paul obtained the agreement of the other petitioners, strangers to the immediate dispute, *to refuse to sell any insurance to its policyholders*. "A valuable service germane to [respondents'] business and important to their effective competition with others was withheld from them by collective action."
>
> The agreement binding petitioners *erected a barrier between St. Paul's customers and any alternative source* of the desired coverage, effectively foreclosing all possibility of competition anywhere in the relevant market. *This concerted refusal to deal went well be-*

[18] A "sunset clause" limits the reinsurer's liability to those claims presented to it by the primary insurer prior to a specified date.

> *yond a private agreement to fix rates and terms of coverage*, as it denied policyholders the benefits of competition in vital matters such as claims policy and quality of service.

Id. at 552-53, 98 S.Ct. at 2935-36 (citation omitted) (emphasis added).

In contrast, plaintiffs here charge no more than an agreement to restrict coverage. But they seek to piggyback this charge on conclusory allegations of pressure and compulsion that echo *Barry*. The decision in *Barry*, however, turned not on the pressure and compulsion directed at policy holders to submit to curtailed coverage, but on the agreement with competitors not to deal with those policy holders on any terms. As the Court said:

> Solely for the purpose of forcing physicians and hospitals to accede to a substantial curtailment of the coverage previously available, St. Paul induced its competitors to refuse to deal on any terms with its customers. *This agreement did not simply fix rates or terms of coverage;* it effectively barred St. Paul's policyholders from all access to alternative sources of coverage and even from negotiating for more favorable terms elsewhere in the market. The pact served as a tactical weapon invoked by St. Paul in support of a dispute with its policyholders. *The enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott.*

Id. at 544-45, 98 S. Ct. at 2931 (emphasis added).

Thus, the issue is not whether defendants used pressure to reduce the coverage available to buyers of insurance. The issue is whether they entered into concerted refusals to deal that denied consumers access to the markets for the desired coverages. The Ninth Circuit explained the meaning of boycott in *Feinstein:* "Because [the agree-

ment] in no way limited the doctors' ability to deal with third parties, the agreement itself is not an agreement to boycott or coerce the plaintiff to purchase the defendants' insurance." 714 F.2d at 933.

The distinction between lawful joint action and prohibited boycott and coercion is also explained in *Proctor v. State Farm Mutual Automobile Insurance Co.*, 561 F.2d 262 (D.C. Cir. 1977):

> The facts in *South-Eastern Underwriters* are a useful guidepost. Logically speaking, a simple agreement among insurance companies to charge certain premium rates could be viewed as a boycott agreement, since its observance would result in a collective refusal to deal with policyholders except at a fixed price. But the Supreme Court's opinion in *South-Eastern Underwriters* did not characterize the basic rate-fixing agreement in that case in terms of "boycott, coercion, or intimidation"; those terms were reserved for the additional activities utilized to enforce the agreement. Since the McCarran Act was passed in response to *South-Eastern Underwriters*, and since a construction of the boycott provision to encompass a simple rate-fixing agreement would indeed emasculate the Act's antitrust exemption, it is reasonable to infer that in a state-setting context something in the way of enforcement activity would be required to make out a claim of "boycott, coercion, or intimidation" within the meaning of the Act.

Id. at 274 (citation omitted).[19]

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[19] The *Proctor* court referred to the Supreme Court's opinion in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944), which described the conduct of defendants as consisting of coercion and intimidation to force non-member insurance companies into the conspiracies and to compel persons who needed insurance to buy only from South-Eastern Underwriters on its terms.

This interpretation of boycott and coercion has been consistently followed, in the context of coverage as well as rates. *See, e.g., Meicler v. Aetna Cas. and Sur. Co.*, 506 F.2d 732, 734 (5th Cir. 1975) (parallel actions of insurance companies to refuse to offer insurance except under rate regulation scheme adopted by state not a boycott); *UNR Indus. Inc. v. Continental Ins. Co.*, 607 F. Supp. 855, 862-63 (N.D. Ill. 1984) (conspiracy among insurance companies to refuse to offer occurrence policies not a boycott); *Grant v. Erie Ins. Exch.*, 542 F.Supp. 457, 464-66 (M.D. Pa. 1982) (conspiracy to refuse to offer insurance covering work loss benefits of individuals killed in motor vehicle accidents not a boycott) *aff'd mem.*, 716 F.2d 890 (3d Cir.), *cert. denied*, 464 U.S. 938, 104 S.Ct. 349, 78 L.Ed.2d 314 (1983).

Professors Areeda and Hovenkamp concur with this view and reject the interpretation of *Barry* urged by plaintiffs:

> The implications of *St. Paul* are not clear. On the one hand, a horizontal agreement among competitors to set the terms of insurance policies—for example, price fixing—is a collective agreement not to deal on any other terms; by the agreement, each enlists the aid of the other, a third party, "to compel capitulation by the boycotted group," namely, insurance buyers. In this sense, virtually any horizontal agreement among competitors could be called a "boycott."
>
> However, there are two reasons for supposing that the Supreme Court did not mean to go that far. First, such a reading would eviscerate the immunity for horizontal agreements on the "business of insurance" and thus seems inconsistent with the statute. Second, *St. Paul* itself did involve an agreement to adopt similar terms. Instead, it was alleged that three insurers withdrew from the market for an anticompetitive purpose.

P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 210.2, at 107-08 (Supp. 1988).

The gravamen of the cases before the Court is alleged horizontal agreements relating to the terms on which the participants were willing to write insurance and reinsurance. By joint action in the ISO and in the reinsurance and umbrella and excess insurance markets, the various defendants sought to bring about the use of policies that would limit their exposure. There is no charge and no evidence that any defendants conspired to refuse to do business with any person or firm to achieve their objectives, or that by other improper means they enforced their collective decisions against others.[20]

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[20] At the hearing, plaintiffs argued that ISO's withdrawal of statistical support for the 1973 policy forms after regulatory approval had been given by the relevant states to new forms amounted to coercion. The complaints allege in relevant part:

> On July 1, 1987, ISO officially withdrew "support" of the 1973 CGL form. "Support" in this context includes the normal data collection and actuarial services performed by ISO in aid of its member companies. Without such support, most ISO members could not continue to use the 1973 occurrence form, because it is very difficult and expensive for any single company to duplicate the critical ISO support functions. (Cal. Compl't ¶ 99; Conn.Compl't ¶ 103.)

The conduct alleged, termination of statistical support for a superseded policy form, is on its face reasonable conduct that one would expect in the normal course of business. There is nothing inherently coercive or wrongful about it. There is no allegation that any insurer desired to continue to write insurance on the 1973 policy form but was coerced by defendants into not doing so by means of this conduct, and plaintiffs did not offer to amend their complaints or conduct specific discovery on this point. The allegation that "most ISO members" would find it "difficult and expensive . . . to duplicate the critical ISO support functions" is not sufficient to warrant subjecting these defendants to an antitrust action. *See Ocean State Physicians Health Plan Inc. v. Blue Cross & Blue Shield of Rhode Island*, 883 F.2d 1101, 1109 n.9 (1st Cir.1989) ("Coercion [under the McCarran Act] has not generally been interpreted to include situations where options have not been entirely closed off to the allegedly coerced parties, even though such options may have been made more expensive"). To hold otherwise would be somewhat ironic, for it is the McCarran Act that allows the insur-

The distinction between prohibited boycott and coercion and immune joint activities is illustrated by *In re Workers' Compensation Insurance Antitrust Litigation*, 867 F.2d 1552 (8th Cir.), *cert. denied*, —— U.S. ——, 109 S.Ct. 3247, 106 L.Ed.2d 593 (1989). That court held that "the practice of mere price fixing, i.e. a refusal to deal except at a specified price, without more," is not a McCarran Act boycott. *Id.* at 1561. "The crucial element . . . [of a boycott] is an effort to exclude or cause disadvantage to one or more competitors by cutting them off from trade relationships which are necessary to any firm trying to compete." *Id.* at 1561, n. 14 (quotation omitted). In reversing a grant of summary judgment of no boycott, the *Workers' Compensation* court relied on evidence of an agreement to exclude competing insurers from membership in the Minnesota Rating Association; such membership was required by Minnesota law as a condition to writing workers' compensation insurance in the state. *Id.* at 1563. In contrast, in the instant case the allegations are limited to collective refusals to do business except upon terms acceptable to defendants. There is not even a suggestion that any underwriter or reinsurer (or anyone else) was prevented from having free and unimpaired access to any market.

The purpose of McCarran Act immunity is to permit joint action by insurers and underwriters within the states' regulatory schemes to formulate policy terms and determine cov rage. While it is not a necessary part of the policy development process that the participants would then offer substantially similar policies to the public, it is a consequence that could be reasonably anticipated. To subject the participants in the collective form development

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ance industry, including defendants, to provide through ISO the suport functions which plaintiffs regard as critical; it makes little sense then to impose antitrust liability on defendants, who are permitted by the McCarran Act to agree to provide the support, for agreeing to discontinue it as to a policy form no longer in use.

process to the risk of antitrust liability for using the product of that process would effectually nullify the McCarran Act. It makes no sense, therefore, for the plaintiffs to rest their boycott claim on the allegation of such an agreement. It is also implicit that joint action comprehends efforts to seek agreement by others, including those who might be unwilling to agree were it not for economic exigencies, and again it makes no sense to assert that such efforts constitute non-immune coercion.

What the McCarran Act leaves unprotected is conduct which goes beyond the making and implementation of agreements to do business only on terms acceptable to the participant (even if such agreements would otherwise violate Section 1), such as refusals to deal on any terms and exclusion from alternative sources. *See Barry*, 438 U.S. at 544-45, 98 S.Ct. at 2931. Such conduct is not charged here.

Dismissal of a complaint for failure to state a claim is not proper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). But judgment of dismissal is appropriate if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988). Conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim. *Id.*

Under the well-pleaded allegations of these complaints, plaintiffs could prove no boycott or coercion. Plaintiffs do not suggest that their pleadings could be amended to cure their deficiencies.

Nor have plaintiffs come forward with specific facts which raise a triable issue as to boycott or coercion. And this is true though plaintiffs in their capacity as

state regulators conducted lengthy investigations under their regulatory laws which gave them extensive access to the files and records at least of the domestic defendants as well as to other sources of relevant information. Plaintiffs have been given the opportunity also to conduct relevant discovery and have not suggested that they needed discovery to be able fairly to meet this motion.

Accordingly, all defendants are entitled to dismissal of the complaints without leave to amend, or in the alternative summary judgment (considering defendants' submissions outside the pleadings), on all federal law claims in the various complaints. In addition all defendants are entitled to judgment on the Sixth and Seventh Claims of the First Wave Complaints and the Fourth and Sixth Claims of the Second Wave Complaints for failure to allege boycott, coercion, or intimidation. *See Freier v. New York Life Ins. Co.*, 679 F.2d 780, 783 (9th Cir. 1982).

The foreign reinsurer defendants named in the Fifth, Sixth, and Eighth Claims of the First Wave Complaints and the Third, Fourth, and Fifth Claims of the Second Wave Complaints have joined in this motion as an alternate ground for dismissal. They have also made a motion to dismiss on the ground of international comity which the Court grants. (*See infra* § V.E(3).) Because that motion rests on the proposition that those defendants are not subject to the antitrust laws, it raises the question whether, as a result, they also are not subject to state regulation to a degree sufficient to be entitled to McCarran Act immunity. It does not appear necessary to resolve that issue here, however; if the dismissal on comity grounds is sustained, the alternative ground for dismissal under the McCarran Act will be moot. Conversely, if it is not sustained, it will be because American regulatory laws apply to them and hence the McCarran Act as well.

B. STATE ACTION IMMUNITY, STATUTORY INTERPRETATION, AND CAUSATION

Defendants have moved for summary judgment with respect to those claims which "relate to the collective form-making process in those states that took action to approve, disapprove or withhold approval of the revised ISO CGL forms." (Def. Memo. 1.) This motion, therefore, is limited in its scope; it does not reach conduct outside of the collective activities to revise the CGL policy forms and it does not apply to plaintiff states, or plaintiffs in states, that do not have a procedure for approval, disapproval, or withholding approval of policy forms, namely Alaska, California, Colorado, and Montana. Because plaintiffs' opposition memorandum either misconceives or ignores the narrow scope of this motion, its arguments are in large part irrelevant.

(1) *State Action Immunity*

In *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1934), the Supreme Court held that the Sherman Act was not intended to prohibit states from imposing restraints on competition. The circumstances under which this state action immunity extends to private parties were defined in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980): "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy,' and, second, the State 'must supervise actively any private anticompetitive conduct.'" 445 U.S. at 105, 100 S.Ct. at 943 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978) (Brennan, J.)).

(a) State Policy

There is no question that all of the states have clearly articulated and affirmatively expressed policies permitting collective policy form development activities. Each of the

states has licensed ISO and its members to engage in certain collective activities, including filing of rates and policy forms and developing policy forms.

These actions are governed by *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985). There the Supreme Court applied state action immunity to collective rate making activities under state laws permitting—but not requiring—motor carriers to agree on rates subject to the supervision of the state public services commission having authority to accept, reject, or modify the agreed rates. The same situation is presented here. The states have authorized the insurers to agree on policy forms subject to the supervisory authority of the insurance regulators. Most of the states require regulatory approval before a form may be used; others permit a form to be used unless or until the regulators disapprove it. (Def.Memo. 5-6.) And here, as in *Southern Motor Carriers Rate Conference*, insurers were not required to participate in the collective activities of ISO and were free to use policies other than those developed and sponsored by ISO.

Plaintiffs argue that the states have authorized only voluntary joint action, not coercion or boycotts. But the fact that the states prohibit coercion and boycotts does not diminish the immunity flowing from the authority to conduct collective policy development activities. That immunity depends on the presence of active state supervision, as discussed below, and the states' prohibition of coercion and boycott is simply one aspect of this supervision. To argue that the presence of such state law prohibitions nullifies the state action immunity would be to turn the doctrine on its head. The premise of that doctrine is that it immunizes conduct that might otherwise run afoul of the antitrust laws. It does so "to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace." *Southern Motor Car-*

riers Rate Conference, 471 U.S. at 61, 105 S.Ct. at 1729. It achieves that end by allowing states "to adopt policies that permit, but do not compel, anticompetitive conduct by regulated private parties." *Id.* at 66, 105 S.Ct. at 1731. Under the regulatory schemes of the relevant states, insurers are permitted to engage in collective policy development but are not required to do so or to adopt the collectively produced policies; activities directed to an insurer's individual decision what coverage to offer, as distinct from what terms to include in ISO policy forms, are not claimed to be covered by state action immunity and are not addressed by this motion.

Plaintiffs' reliance on *Medic Air Corp. v. Air Ambulance Authority*, 843 F.2d 1187 (9th Cir. 1988), is misplaced. That case held that defendant did not, by reason of having been designated by the state as an exclusive ambulance dispatcher, become immune against a claim that it had restrained competition in the market for air ambulance services. The immunity which attached to dispatch services did not extend to activities in the separate and distinct market for ambulance services. But that reasoning does not apply where, as here, the restraint complained of occurred (though not exclusively) in the course of the protected conduct, i.e. the collective development of terms for policies to be issued by the participating insurers, which was exactly what the states permitted to be done.

(b) State Supervision

State action immunity applies only where the state actively supervises "to ensure that [it] will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 1663, 100 L.Ed.2d 83 (1988). Plaintiffs argue that state supervision in this case does not reach the restraints alleged, i.e., "the agreements and acts to limit or eliminate the availability of consumer-demanded coverages."

(Unified Opp. 58.) But in *Patrick*, the Court specifically referred to the state public service commission's "ultimate authority and control over all intrastate rates" in *Southern Motor Carriers Rate Conference* as an example of what constitutes active supervision. *Id.* (quoting *Southern Motor Carriers Rate Conference*, 471 U.S. at 51, 105 S.Ct. at 1723). As noted above, there, as here, supervision took the form of approval, disapproval, or modification of the end product of the collective action. That degree of supervision was sufficient protection of the public interest, without the necessity of additional supervision of the manner in which the participants conducted the collective process.

Plaintiffs contend that, even if the state action immunity otherwise applied, its application here is barred by the McCarran Act which, they contend, specifically reserves application of the Sherman Act to boycott and coercion. *Cf. Ballard v. Blue Shield of Southern W. Va., Inc.*, 543 F.2d 1075, 1078-79 (4th Cir. 1976), *cert. denied*, 430 U.S. 922, 97 S.Ct. 1341, 51 L.Ed.2d 601 (1977). The two immunity doctrines are not congruent and need to be distinguished with care. The McCarran Act, as discussed in section V.A., *supra*, grants to the insurance business a limited immunity from the antitrust laws, conditioned on a degree of state regulation. State action immunity, as discussed here, permits the states to displace the antitrust laws with respect to specified activities actively supervised by the states. *See generally* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶¶ 210.1b, 212.1f, at 113 (Supp. 1988) ("The [Supreme] Court's view of federalism [under *Parker v. Brown*] has left enormous discretion to the states to displace competition."). Plaintiffs' contention was most recently addressed and rejected in *Health Care Equalization Committee v. Iowa Medical Society*, 851 F.2d 1020, 1027 n. 10 (8th Cir. 1988), where the court stated that it would be anomalous to hold that Congress, by adopting the McCarran Act, intended to subject

insurance companies to antitrust liability for actions that would be exempt if engaged in by others.

The state action immunity motion must therefore be granted.

(2) *Statutory Interpretation*

Defendants also contend that because the effects complained of resulted from the actions of the states which approved the use of the revised policy forms, there could have been no restraint of trade. Their reliance on *In re Airport Car Rental Antitrust Litigation*, 521 F.Supp. 568 (N.D. Cal. 1981), *aff'd.*, 693 F.2d 84 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133, 103 S.Ct. 3114, 77 L.Ed.2d 1368 (1983), is, however, misplaced. The restraint complained of in that case flowed from the decision of airport authorities not to lease space to plaintiffs. The fact that that decision may have been influenced by a conspiracy among defendants did not make the defendants responsible for the airport authorities' independent exercise of judgment to exclude plaintiffs. In the instant actions, however, the restraints complained of did not flow from the actions of state regulators who approved or disapproved policy forms; they flowed from the collective actions of defendants by which they allegedly sought to bring about the use of policy forms that restricted available insurance coverage. To the extent that their conduct is not immune from antitrust scrutiny, defendants would be responsible for its consequences.

Defendants also argue that plaintiffs cannot demonstrate the existence of a restraint in the policy form development process. (Reply 1-10.) The argument seems to rest on confusion between Sherman Act liability and the effect of the McCarran Act. There is little question that, in the absence of McCarran Act immunity, allegations of collective action by defendants to bring about reduced coverage for purchasers of insurance would state a claim under Section 1:

> There is no doubt that the members of such [trade] associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm. Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny.

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 108 S.Ct. 1931, 1937, 100 L.Ed.2d 497 (1988). It would not matter for purposes of Section 1 that, as defendants argue, the collective action of defendants did not limit an individual insurer's ability to offer broader coverage. (Reply 5.) The individual insurer's continued freedom is relevant only to application of Section 1013(b) of the McCarran Act, the boycott exclusion, not to liability for anti-competitive agreements.

The motion based on statutory interpretation must therefore be denied.

(3) *Causation*

The foregoing analysis also disposes of defendants' contention that plaintiffs were not injured "by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). No states required insurers to adopt the approved forms. Hence, injury flowing from prohibited collective action to coerce competitors to restrict coverage or deny consumers access to insurance coverage, unless otherwise immune, would fall within Section 4 of the Clayton Act.

There being no disputed issues of fact material to the disposition of this motion, and for the reasons stated, defendants' motion for summary judgment on all claims based on defendants' participation in the collective policy development process asserted by states, and plaintiffs in states, other than Alaska, California, Colorado, and Mon-

tana must be granted on the ground of state action immunity, but will otherwise be denied.

C. STANDING

The domestic and foreign reinsurer defendants[21] have moved to dismiss the complaints against them on the ground that plaintiffs do not have standing to complain of actions taken in the reinsurance and retrocessional insurance markets.[22]

The reinsurer defendants characterize the complaints as alleging three distinct insurance markets: primary insurance, reinsurance, and retrocessional insurance. They contend that plaintiffs claim to have participated only in the primary insurance market and that the defendant reinsurers are alleged to have conspired only in the reinsurance and retrocessional insurance markets. On this basis, defendants contend that plaintiffs do not claim to have been directly affected by the alleged conduct of these defendants and that, therefore, plaintiffs do not have standing to assert the antitrust claims pleaded.

To have standing to assert an antitrust claim, a plaintiff must allege that it has suffered harm as a direct result of the defendant's conduct and that this harm is within the scope of the protection of the antitrust laws. *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 478, 102 S.Ct. 2540, 2547, 73 L.Ed.2d 149 (1982). Accepting, as the Court must, the allegations of the complaint, they establish that the terms and availability of reinsurance directly affect the availability of insurance coverage to consumers. As discussed in section V.A.(1), *supra*, plaintiffs' contention is that the reinsurers' alleged conspiracy

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[21] All defendants other than ISO, INA, Hartford, Allstate, Aetna, and CIGNA.

[22] This motion does not include the claims against Merrett and Three Quays alleging an agreement in restraint of trade in the excess and umbrella insurance market.

to eliminate reinsurance for certain CGL coverages "led inexorably to an injury . . . in the interrelated primary insurance market."

The claims against these defendants therefore fall within the analysis in *McCready*, in which a Blue Cross subscriber was found to have standing to challenge an alleged conspiracy between Blue Cross and psychiatrists to deny reimbursement of psychologists' services. Though the restraint occurred in a market (the market for psychiatrists' services) in which plaintiff was not a consumer, the Court reasoned that plaintiff had standing:

> McCready claims that she has been the victim of a concerted refusal to pay on the part of Blue Shield, motivated by a desire to deprive psychologists of the patronage of Blue Shield subscribers. Denying reimbursement to subscribers for the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its illegal ends. The harm to McCready and her class was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the alleged illegal conspiracy. Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely " 'the type of loss that the claimed violations . . . would be likely to cause.' "

457 U.S. at 479, 102 S.Ct. at 2548 (citations omitted). And that was true even though plaintiff's plan coverage was purchased and paid for by her employer; as a consumer of psychotherapy services, she nevertheless was within the area of the economy threatened by a breakdown of competitive conditions resulting from Blue Cross's refusal to reimburse for services she desired.

Plaintiffs' allegations suffice to establish agreements the direct effect of which, if true, would be to restrain the availability of desired coverages in the markets in which plaintiffs purchase insurance. *Associated General Con-*

tractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), is distinguishable. There the plaintiff unions complained of a conspiracy by defendants to abrogate or weaken the collective bargaining relationship between the unions and employers. As the Court there observed, "the Union was neither a consumer nor a competitor in the market in which trade was restrained." *Id.* at 539, 103 S.Ct. at 909. And it was "not clear" whether the Union's interests would be served or disserved by enhanced competition in that market. Moreover, the claim of causation between the Union's injury and the alleged restraint contained "somewhat vaguely defined links." *Id.* at 540, 103 S.Ct. at 909.

On the face of the allegations, plaintiffs have standing. The motion based on lack of standing must be denied.

D. GLOBAL CONSPIRACY CLAIM

Foreign reinsurer defendants have moved to dismiss the First Claim of the Second Wave Complaints, the so-called global conspiracy claim. That claim alleges that all defendants, including the moving defendants, engaged in a conspiracy to restrain the market for CGL property and casualty risks and for reinsurance and retrocessional reinsurance by agreeing to limit or eliminate occurrence, pollution, retroactive, and long-tail coverage, which are the subjects of the allegations of the complaints. In other words, this claim links all of the various specific claims of wrong-doing by various groups of defendants in various markets to allege one global conspiracy among all defendants.

The moving defendants are foreign reinsurers doing business in London. They are named in the Second, Third, and Sixth claims of the Second Wave Complaints in connection with discrete conspiracy claims. They make this motion on the ground that the First Claim merely lumps

together the separate conspiracies elsewhere alleged without any allegation indicating how the separate conspiracies became a single global conspiracy. (Def. Memo. 4.) No question is raised as to the sufficiency of the pleading of the discrete conspiracies in the other claims.

Plaintiffs respond that the complaints "allege that all of the defendants were conspirators who intended to prevent the States from obtaining consumer-demanded insurance coverages." (Unified Opp. 106.) Plaintiffs' theory is that because "the conspiracies alleged are linked by a common purpose, by overlapping defendants and by interconnected acts," a jury could find a single global conspiracy among all the participants in the separate conspiracies. (*Id.* at 109-10.)

A conspiracy is a combination of two or more persons acting in concert to accomplish a common unlawful purpose. A coconspirator need not know the identity of all other conspirators or the full extent of the conspiracy. *E.g., United States v. Metropolitan Enterprises, Inc.*, 728 F.2d 444, 450-51 (10th Cir. 1984). But there must be a common agreement and understanding. Mere identity of purpose, interconnected events, and shared participants, on which plaintiffs base their claim, do not link separate conspiracies into one overall, single conspiracy. (*See* Unified Opp. 110-12.) For separate activities to result in a single conspiracy, the allegations and proof must reflect a wheel and spoke arrangement in which a single person at the hub implements the conspiracy by a series of arrangements with others to carry out the purpose of their conspiracy. *See, e.g., United States v. Levine*, 546 F.2d 658, 662-63 (5th Cir. 1977). But such separate activities, even if for a common purpose, do not constitute a conspiracy "without the rim of the wheel to enclose the spokes." *Kotteakos v. United States*, 328 U.S. 750, 755, 66 S.Ct. 1239, 1243, 90 L.Ed. 1557 (1946). There must be a connection among all the alleged participants sufficient to support a finding that they had entered into the

alleged conspiracy. *Id.* at 754, 66 S.Ct. at 1242. *See also Pinhas v. Summit Health, Ltd.*, 880 F.2d 1108 (9th Cir. 1989) ("Pinhas alleges . . . that as a result of his refusal to sign the 'sham' contract, appellees entered into *a* conspiracy . . . to suspend and terminate his medical staff privileges . . . and to have the report of his termination disseminated. . . .") (emphasis added).

Plaintiffs have made no attempt to show the existence of such a connection to support a finding of a single overall conspiracy, and the allegations of the complaint would not permit proof of one. They allege a number of different conspiracies having different members and different subject matter. For example, the Fifth Claim of the Second Wave Complaints charges some defendants, some of whom are not named elsewhere, with having conspired to restrict the terms under which property insurance and reinsurance would be provided for North American risks. Property insurance has not been alleged to have a connection with CGL insurance or with the market in which CGL insurance is sold. Thus, if all of the facts alleged in the complaint were proved at trial, a conspiracy verdict against these defendants under the First Claim could not stand. The motion of these defendants to dismiss the First Claim of the Second Wave Complaints must therefore be granted.[23]

E. SUBJECT MATTER JURISDICTION AND COMITY

The defendants named in the Sixth and Eighth Claims of the First Wave Complaints and the Fourth and Fifth Claims of the Second Wave Complaints[24] have moved to dismiss those claims for lack of subject matter jurisdic-

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[23] At the hearing, the remaining defendants joined in this motion. No objection having been made, this claim will be dismissed against all defendants.

[24] These claims will be referred to collectively as the Sixth Claim and the Eighth Claim, respectively.

tion or on the basis of international comity.[25] The motion is based on the Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246 ("FTAIA"), and on the doctrine of international comity as stated in *Timberlane Lumber Co. v. Bank of America.*[26]

The following allegations are relevant:

In the Fifth Claim, plaintiffs allege that the defendant London reinsurers agreed to restrict the terms on which reinsurance would be written and to refuse to reinsure risks written on the occurrence form or "long-tail" risks. They allege agreements among defendants, coercion and intimidation of primary insurers to use the claims-made form and reject the occurrence form, and coercion and intimidation of individuals who might communicate with regulatory bodies. (Conn.Compl't ¶¶ 91, 93, 127-128; Cal. Compl't ¶¶ 87, 89, 133-134.) As a result, it is alleged that occurrence liability has become unavailable for many risks and the price of such coverage has increased. (Conn. Compl't ¶ 129; Cal. Compl't ¶ 135.)

In the Sixth Claim, plaintiffs allege that, at a meeting in London, the defendant London reinsurers and one reinsurance broker agreed that all North American casualty reinsurance treaties would be written with a pollution exclusion (Conn.Compl't ¶ 99; Cal. Compl't ¶ 95) lessening the availability and affordability of pollution liability coverage from primary insurers throughout the United States (Conn.Compl't ¶ 97; Cal. Compl't ¶ 93).

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[25] At the hearing these defendants asked that their motion be treated as encompassing also the Fifth Claim of the First Wave Complaints and the Third Claim of the Second Wave Complaints (collectively referred to as the Fifth Claim). No objections having been made, the issues having been fully briefed, and in the absence of prejudice to plaintiffs, this request is granted.

[26] *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir.1976) (*"Timberlane I"*), *on remand*, 574 F.Supp. 1453 (N.D.Cal.1983), *aff'd*, 749 F.2d 1378 (9th Cir.1984) (*"Timberlane II"*), *cert. denied*, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985).

In the Eighth Claim, plaintiffs allege that a group of London retrocessional reinsurers, including the seven named defendants, agreed in 1987 to boycott retrocessional reinsurance treaties which included coverage for North American property risks, unless the original insurance coverage contained a seepage, pollution, and contamination exclusion clause. (Conn.Compl't ¶ 138(b); Cal.Compl't ¶ 149(b).) As a result, seepage and pollution coverage has been excluded from policies on American risks, and prices for such coverage have been increased. (Conn.Compl't ¶ 139; Cal.Compl't ¶ 150.)

(1) *The Factual Background*

The London insurance markets in which the defendants named in the Fifth, Sixth, and Eighth Claims conduct their reinsurance and retrocessional reinsurance business are composed of underwriters at Lloyd's of London, other London insurance firms ("London Company Market" firms), and brokers who obtain coverage in these markets. *See, e.g., Edinburgh Assurance Co. v. R.L. Burns Corp.*, 479 F.Supp. 138, 144 (C.D. Cal. 1979), *aff'd in part and rev'd in part on other grounds*, 669 F.2d 1259 (9th Cir. 1982); *Syndicate 420 at Lloyd's, London v. Early American Ins. Co.*, 796 F.2d 821, 824 (5th Cir. 1986); *Travelers Indemnity Co. v. Booker*, 657 F.Supp. 280, 282-83 (D.D.C. 1987).

As described in *Edinburgh Assurance*, the purchase and sale of insurance in London takes place on the floor of the underwriting room at Lloyd's and in the offices of individual insurance companies. A Lloyd's or London Company Market agent evaluates and negotiates proposed insurance placements brought by brokers for the consideration of the syndicate of underwriters that the agent represents.[27] 479 F.Supp. at 145. A "slip" (a broker-

[27] Underwriters at Lloyd's must be individuals trading for their own accounts. However, underwriters band together into syndicates represented by one or more underwriting agents. Department of

originated document containing the essential features of the coverage sought) is presented to each underwriter. *Id.* Because many risks are too large to be insured by just one London market participant, the broker circulates the slip among numerous underwriting agents, each of whom makes the individual decision whether to underwrite a portion of the risk. *See id.* Because the spreading of large risks in the London reinsurance and retrocessional insurance markets necessarily requires numerous subscribers (*see* Conn.Compl't ¶ 4(w); Cal.Compl't ¶ 28), negotiations over the terms and conditions on which risks will be accepted and insured are integral to the functioning of the market. Underwriters negotiate with brokers over the terms on which they are willing to accept a risk. Because different underwriters may be willing to accept a particular risk on different terms, brokers and underwriters may have to negotiate mutually agreeable terms and conditions on which that risk will be accepted. *See Edinburgh Assurance*, 479 F.Supp. at 145.

The sequence of insurance transactions resulting in the purchase of reinsurance and retrocessional reinsurance in the London markets begins with the purchase of primary insurance by the consumer. The primary insurer in the United States may then elect to reinsure some portion of the portfolio of risks it has underwritten. (Conn.Compl't ¶ 4(p); Cal.Compl't ¶ 26.) The form of reinsurance most pertinent to these cases is known as "treaty" reinsurance (Cal.Compl't ¶ 27), in which the reinsurance company agrees in advance to indemnify a primary insurance company for a defined portion of the risks to be assumed by the primary carrier during the treaty period (Conn. Compl't ¶ 4(w); Cal.Compl't ¶¶ 4(p), 27). As a participant in a reinsurance treaty, a reinsurer does not deal directly with primary insurance consumers or individual

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the Treasury, Report to Congress on the Taxation of Income Earned by Members of Insurance or Reinsurance Syndicates 5-6 (February, 1989).

risks and may never know the identity of individual risks within the portfolio of risks included in the treaty. *See Excess and Casualty Reinsurance Ass'n v. Ins. Comm'r*, 656 F.2d 491, 492, 495 (9th Cir. 1981); *American Re-Insurance Co. v. Insurance Comm'r*, 527 F.Supp. 444, 453 (C.D. Cal. 1981). When the primary insurer seeks reinsurance coverage in the London market, one of several reinsurance centers, it initiates the type of reinsurance transaction which is the subject of the Sixth Claim.

Reinsurers also purchase reinsurance. This step in the sequence of reinsurance transactions, and the one which is the subject of the Eighth Claim, may occur in the London market for retrocessional reinsurance. Retrocessional reinsurance means reinsurance of the business written by reinsurers. (*See also* Conn.Compl't ¶ 4(r); Cal.Compl't ¶ 107.) Plaintiffs' Eighth Claim refers to the so-called LMX market which consists of those retrocessional reinsurers who specialize in providing retrocessional reinsurance for Lloyd's of London and the London Company Market firms. (Conn. Compl't ¶ 111; Cal.Compl't ¶ 107.) At this level, the purchaser of retrocessional reinsurance is a Lloyd's or London Company Market reinsurer.

(2) *Subject Matter Jurisdiction*

By virtue of the FTAIA, the Sherman Act does "not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations . . ." unless that conduct has a "direct, substantial, and reasonably foreseeable effect" on commerce within the United States, import trade into the United States, or export trade engaged in by a person within the United States. 15 U.S.C. § 6a.

Plaintiffs contend that the conduct alleged involved agreements to restrain the provision of reinsurance for American risks, and hence the import into the United States of insurance services. These allegations are sufficient to invoke the import exception of the FTAIA.

Defendants contend that the FTAIA applies nevertheless because the conduct complained of in these claims is wholly foreign commerce. The subject matter of the alleged agreement, however, concerned the provision of reinsurance within the United States, and the allegations of effects in United States markets are sufficient to preclude a characterization of wholly foreign commerce.

The First Wave Complaints allege that the London market is one of the three principal markets for the supply of reinsurance (Cal.Compl't ¶ 29), and all complaints allege that the agreements made in the London market had the effect of limiting the ability of primary insurers to obtain reinsurance except on certain terms, and for a higher price (Conn.Compl't ¶¶ 97, 100, 134, 139; Cal.Compl't ¶¶ 138, 140, 148, 150). The complaints further allege that the availability of primary coverage hinges on the primary insurers' ability to obtain reinsurance of risks (Conn.Compl't ¶ 4(p); Cal.Compl't ¶ 34), and that the availability of reinsurance hinges on the availability of retrocessional reinsurance (Conn.Compl't ¶¶ 110, 114; *see* Cal.Compl't ¶ 150). Thus, plaintiffs have adequately alleged that a decision not to provide reinsurance or retrocessional reinsurance to cover certain types of risks in the United States has a direct effect on the availability of primary insurance in the United States. *Cf. McGlinchy v. Shell Oil Co.*, 845 F.2d 802, 815 (9th Cir. 1988) (no direct, substantial, and reasonably foreseeable effect on United States commerce where agreements involved orders for products in South East Asia and other areas outside the United States). Therefore, the FTAIA does not apply.

Where the FTAIA does not apply, the Court must determine whether it has subject matter jurisdiction under the analysis in *Timberlane I:* (1) whether the alleged restraint affected or was intended to affect the foreign commerce of the United States, and (2) whether

it is a cognizable violation of the Sherman Act.[28] 549 F.2d at 615. The allegations that establish a direct effect in the United States are sufficient to establish this Court's subject matter jurisdiction under *Timberlane I*.

(3) *International Comity*

Regardless of whether subject matter jurisdiction exists, this Court may determine that its jurisdiction under the antitrust laws should not be exercised on the ground of international comity. *See Timberlane I*, 549 F.2d at 613-14.[29] This issue is properly raised and disposed of by

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[28] There is some uncertainty whether the *Timberlane* analysis for extraterritorial application of the antitrust laws has been superseded by the FTAIA. It is arguable that the FTAIA codifies the standard for determining whether there is extraterritorial jurisdiction for all cases, not only for those cases involving non-import trade. *See* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 236, at 235 (Supp.1988) ("The most interesting question about the new statute is whether its standard for appraising export restraints differs from that for appraising import restraints or whether it merely 'codifies' a general understanding of when American antitrust should be concerned about restraints abroad that might affect United States interests only indirectly, insubstantially, or unforeseeably."); Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 Fordham L.Rev. 201, 222 (1982) ("[i]t is . . . not clear whether the specific effect test set forth in the Act is limited to determining whether export transactions of purely foreign transactions have the requisite effect on United States trade. The test might also be used in determining whether *import* transactions . . . have the requisite effect on United States trade.") See also the dictum in *McGlinchy*, 845 F.2d at 813 n. 8, that the FTAIA was passed "[i]n an effort to provide a single standard for the issue of extraterritorial application of the Sherman Act." In that case, however, the FTAIA clearly applied because export and foreign transactions were involved.

Until there is a clearer indication that *Timberlane I* no longer controls, however, this Court must follow it.

[29] The legislative history of the FTAIA states that "[i]f a court determines that the requirements for subject matter jurisdiction

a Rule 12(b)(1) motion so long as the merits of plaintiffs' antitrust claims are not reached. *Timberlane II*, 749 F.2d at 1382.

Timberlane I established a rule of reason controlling the extraterritorial application of the antitrust laws. It requires an analysis of whether, as a matter of international comity and fairness, extraterritorial jurisdiction should be asserted. *Timberlane I*, 549 F.2d at 615.

This analysis is governed by seven factors:

> [T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States compared with conduct abroad.

Id. at 614. Each of these seven factors, discussed below, must be balanced in every case. *Timberlane II*, 749 F.2d at 1383 n. 3; *see also Star-Kist Foods, Inc. v. P.J. Rhodes & Co.*, 769 F.2d 1393, 1395 (9th Cir. 1985) (applying *Timberlane* factors to extraterritorial application of the Lanham Act); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 428-29 (9th Cir. 1977) (same). The object of this analysis is to determine whether "the contacts and interests of the United States are sufficient to

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are met, this bill would have no effect on the courts' ability to employ notions of comity, *see, e.g., Timberlane Lumber Co. v. Bank of America*, 549 F.2d 1287 (3rd Cir.1979) [sic]." H.R.Rep. No. 97-686 at 13 (1982), *reprinted in* 1982 U.S.Code Cong. & Admin.News at 2431, 2487, 2498.

support the exercise of extraterritorial jurisdiction." *Timberlane I*, 549 F.2d at 614-15.[30]

(a) Degree of Conflict With Foreign Law or Policy

The London reinsurance and retrocessional reinsurance business, the subject of these claims, takes place in a regulatory and competitive framework established by the British government. In 1870, Parliament, by the Lloyd's Act, established the Society of Lloyd's and empowered it to regulate the marketplace composed of its members. The Lloyd's governing body continues to be empowered to exercise quasi-governmental authority in regulating the activities of its members. Lloyd's Acts, 1870-1982. The London Company Market companies are incorporated in the United Kingdom in accordance with the Companies Act, 1985, are regulated by the Insurance Companies Act, 1982, and associated regulations, and are supervised by the British Department of Trade and Industry. Agreements among British insurers, reinsurers, and retrocessional reinsurers (including both Lloyd's and London Company Market underwriters) relating to the provision of insurance services are expressly exempted from British regulation of anti-competitive agreements. *See* Restrictive Trade Practices (Services) Order 1976, S.I. 1976 No. 98, Schedule ¶ 8.

Plaintiffs argue that, because the Treaty of Rome of 1957, which governs trade regulation in the European

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[30] *Timberlane* has been criticized for requiring courts to balance American and foreign interests which they are not equipped or qualified to do. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948-50 (D.C.Cir.1984) (substantial limits on court's ability to conduct balancing); Aldisert, *Federal Courts and Extraterritorial Antitrust Law: Enlightened Self Interest or Yankee Imperialism?*, 5 J.L. & Com. 415, 419-20, 426-29 (1985) (courts unaccustomed to evaluating interests of other nations); Note, *Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law*, 94 Yale L.J. 1693 (1985) (courts poorly equipped). Its authority in this circuit, however, remains unimpaired.

Economic Community, is part of the law of England, *In re Westinghouse Uranium Contract* [1978] A.C. 547, 564, there is no conflict with English law or policy. Article 85 of the treaty prohibits

> all agreements . . . and concerted practices . . . which have as their object and effect the prevention, *restriction* or distortion *of competition within the common market* and in particular those which: (a) . . . fix purchase or selling prices or any other trading condition; [or] (b) limit or control production, markets, technical development, or investments. . . .

(Emphasis added.) Article 85 has been held to outlaw restrictive practices in the insurance industry notwithstanding its regulation by the state in which it is located. *Verband der Sachversicherer eV v. E.C. Commission*, 4 Common Mkt.Rep. (CCH) 264 (1988). Article 85, plaintiffs contend, establishes that enforcement of American antitrust law is consistent with applicable foreign law.

It seems doubtful, however, that this Article would be applied to outlaw long-standing practices in the London reinsurance market, openly conducted in conformity with English law. Moreover, the Treaty of Rome by its terms applies only to trade between member states, not to trade with a non-member such as the United States, and Article 85 applies only to restriction of competition within the common market.

With respect to the relevant United States-English trade, the evidence of conflict between the antitrust laws and English law and policy is substantial. English courts have repeatedly expressed unmitigated hostility to the extraterritorial application of American antitrust laws. *See In re Westinghouse Uranium Contract*, 1978 A.C. 547, 591 (counsel for the government), 616 (Judgement of Lord Wilberforce), 639 (Judgement of Lord Diplock), 650 (Judgement of Lord Fraser of Tullybelton); *British Nylon Spinners, Ltd. v. Imperial Chemical Industries,*

Ltd., [1952] 2 All E.R. 780 (CA), (LEXIS, Enggen library, Cases file at 10) (Judgement of Sir Evershed, M.R.). *See also Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 946 (D.C. Cir. 1984).

An English "blocking" statute restricts the availability of evidence and production of documents for use in judicial proceedings in the United States. Protection of Trading Interests Act, 1980, ch. 11, § 2, *reprinted in* Antitrust & Trade Reg.Rep. (BNA) No. 959, at F-1; *see* Note, *Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law*, 81 Colum.L.Rev. 1097, 1106-09 (1981) (describing the blocking provision of the Protection of Trading Interests Act). The Protection of Trading Interests Act provides a remedy to English antitrust defendants to recover from plaintiffs the punitive portion of a foreign multiple damage judgment against them where the foreign judgment concerns activities outside the enforcing nation's territory.[31] Protection of Trading Interests Act, *supra*, at § 6; *see* Note, 81 Colum.L.Rev. at 1109-13 (describing section 6 of the Act). This Act has been applied several times notwithstanding the Treaty of Rome. *See* Cira, *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 Stan. J. Int'l L. 247, 251-52 & n. 29 (1982) (between its passage and 1982, the Act applied to issuance of directives barring compliance with American orders, some of which involved U.K. subsidiaries of U.S. parents).

On balance, the Court concludes that enforcement of the antitrust laws against activities in the London reinsurance market would lead to significant conflict with English law and policy. This conflict, unless outweighed

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[31] This ("clawback") provision was aimed at the "pernicious extraterritorial effect doctrine" of American antitrust law. 973 Parl. Deb., H.C. (5th Series) 1535 (1979). It also reflects a view that multiple damages are penal and should be imposed only in proceedings incorporating the protections of criminal proceedings. *See* Note, 81 Colum.L.Rev. at 1103-04.

by other factors in the comity analysis, is itself a sufficient reason to decline exercise of jurisdiction. *Timberlane II*, 749 F.2d at 1384.

(b) The Nationality or Allegiance of the Parties and the Locations of Principal Places of Business of Corporations

All plaintiffs are located in the United States. Although all defendants named in the Fifth, Sixth, and Eighth Claims are located in England and are of English nationality, many of the corporate defendants are subsidiaries of American corporations and may be influenced by the allegiance of their American parents.[32] But it is also true that adjudication of this claim would require the testimony of witnesses and the production and analysis of documents located in England. *See Timberlane II*, 749 F.2d at 1384; *Star-Kist*, 769 F.2d at 1396.

On balance this factor weighs against the exercise of jurisdiction.

(c) The Extent to Which Enforcement by Either State Can Be Expected to Achieve Compliance

A number of barriers stand in the way of enforcement of any judgment against these defendants by English courts. Those courts have previously refused to aid in the enforcement of the judgment of an American court where that court had exercised what the English court considered unlawful extraterritorial jurisdiction. *See British Nylon Spinners, Ltd. v. Imperial Chemical Indus-*

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[32] Note that England, however, does not recognize the extraterritorial application of the laws of the parent corporation's state based on the parent's control of the subsidiary. Note, 81 Colum. L.Rev. at 1100-01. English authorities, moreover, take the position that, in any event, the laws and policies of the territorial state must be accorded primacy. *See* Griffin, *Possible Resolutions of International Disputes Over Enforcement of U.S. Antitrust Law*, 18 Stan. J. Int'l L. 279, 286 (1982).

tries, Ltd., 1 Ch. 19 (1953); 1 Ch. 37 (1955); *see also* the discussion at section V.E.(3)(b), *supra.*

Plaintiffs could collect a judgment by enforcing it against such assets of defendants as may be found in the United States. But it is improbable that there could be enforcement of the requested injunctive relief against activities in London. Indeed, the Protection of Trading Interests Act allows the British Secretary of State for Industry to forbid British nationals from complying with foreign antitrust judgments. Protection of Trading Interests Act, *supra*, at § 1; *see* Note, 81 Colum.L.Rev. at 1104-06.

Thus this factor tips slightly against the exercise of jurisdiction.

(d) The Relative Significance of Effects on the United States as Compared With Those Elsewhere

This factor requires a comparison of the effect of the alleged illegal conduct on the commerce of the United States with its effect abroad. *Timberlane II*, 749 F.2d at 1384.

Plaintiffs allege that half of the reinsurance business covers North American risks. (Conn.Compl't ¶ 4(h); Cal.Compl't ¶ 4(t).) There are no allegations showing what percentage of those risks involved reinsurance for CGL policies covering risks within the United States. And there are no allegations with respect to the relative effects of retrocessional reinsurance agreements. It is clear, however, that the conduct of defendants had a sufficiently significant effect in the United States to make this factor weigh in favor of the exercise of jurisdiction.

(e) The Extent to Which There is Explicit Purpose to Harm or Affect United States Commerce

As in *Timberlane II*, the conduct of defendants complained of in these claims was directed primarily at re-

ducing their exposure to certain risks and controlling losses, a legitimate business purpose. Their actions (as described in section V.E.(1) *supra*) were "consistent with [local] customs and practices." *Timberlane II*, 749 F.2d at 1385. The allegations of the complaints that defendants' purpose was to restrict the availability of certain types of CGL coverage (Conn.Compl't ¶¶ 132, 137; Cal. Compl't ¶¶ 138, 148) is not inconsistent with the existence of a legitimate business purpose for their actions.

This factor, therefore, weighs against the exercise of jurisdiction.

(f) Foreseeability of Such Effect

Defendants concede that the factor of foreseeability of the effect in the United States of their conduct weighs in favor of the exercise of jurisdiction. (Def.Memo. 23.)

(g) The Relative Importance to the Violation Charged of Conduct Within the United States as Compared with Conduct Abroad

The conduct of the defendant reinsurers or retrocessional reinsurers alleged in the Sixth and Eighth Claims is not alleged to have occurred within the United States. Some of the conduct alleged in the Fifth Claim, however, allegedly occurred in the United States. Defendants are alleged to have coerced primary insurers and to have communicated with others to bring about rejection of the occurrence form. Thus relevant conduct occurred within the United States, but its genesis lay in the alleged agreements among the participants in the London market and its purpose was to further those agreements. The alleged activities in the United States are an incident of the market agreement which is the gravamen of the action.

Although the activities within the United States are not insignificant, their significance derives from the alleged foreign agreements. In those circumstances, this factor must be considered as neutral.

(h) Conclusion

The foregoing analysis leads to the conclusion that the conflict with English law and policy which would result from the extra-territorial application of the antitrust laws in this case is not outweighed by other factors. Although the conduct complained of had effects within the United States, it is not alleged to have excluded competitors from markets or denied consumers access to markets, and it is not alleged to have occurred for that purpose.

The pendent state law claims assert claims similar to those arising under the federal antitrust laws. To the extent that they are based on the conduct alleged in the Fifth, Sixth, and Eighth Claims, they should be dismissed for the same reasons. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 727, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966); *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1430 (9th Cir. 1984).

VI. CONCLUSION

Subsequent to the issuance of this ruling, plaintiffs for the first time asked for leave to amend their complaints. The Court has examined Attachment A to plaintiffs' memorandum to vacate judgment or for leave to amend or permit discovery, setting forth the substance of the proposed amendments. Nothing in that attachment would affect the grounds for the Court's ruling. The plain fact is that plaintiffs seek to recover on a theory that, as heretofore explained at length, will not stand under the law.

For the same reason, plaintiffs' discovery request must be denied. That request is based on rather unprofessional assertions to the effect that the Court criticized or faulted the states for not producing evidence or taking discovery and on a misrepresentation of the Court's ruling. (Plf. Memo. 12.) The States have conducted investigations into the subject matter of these actions for some two years,

with all the investigatory powers available to sovereign governments. They were given the right under the pretrial order to conduct discovery relevant to the issues raised by defendants' motions. They are represented by numerous attorneys expert in the antitrust laws. The Court must conclude that the allegations they made in their complaints and the facts they proffered in opposition to the motions represent their best effort—and nothing indicates the contrary.

The Court's ruling accepts the facts alleged in plaintiffs' complaints and their opposition to the motions, and it rests on those facts. There are no factual disputes material to this ruling, which simply applies the law to those facts.

For the reasons stated, judgment will be entered for all defendants dismissing the federal claims in these actions in accordance with the foregoing ruling. The pendent state claims will be dismissed for lack of subject matter jurisdiction, except as otherwise ordered.

IT IS SO ORDERED.

APPENDIX

Actions in MDL Docket 767
Insurance Antitrust Litigation

88-0981

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88-0988

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88-1318
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88-1492
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88-2327
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88-2328
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88-2329
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88-2330
State of Colorado v. Hartford Fire Insurance Company, et al.

88-2331
State of Ohio, et al. v. Hartford Fire Insurance Company, et al.

88-2332
State of Connecticut v. Hartford Fire Insurance Company, et al.

88-2333
Commonwealth of Pennsylvania, et al. v. Hartford Fire Insurance Company, et al.

88-2334
State of Alaska, et al. v. Hartford Fire Insurance Company, et al.

88-2335
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88-2341
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88-4560
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88-4561
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88-4564
Carmella M. "Boots" Liberto v. Hartford Fire Insurance Company, et al.

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Les-Ray Bobcat, Inc., et al. v. Hartford Fire Insurance Company, et al.

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89-1131
State of Louisiana, et al. v. Hartford Fire Insurance Company, et al.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: INSURANCE ANTITRUST LITIGATION

No. 89-16405

DC# CV-88-1688-WWS

ACE CHECK CASHING, INC.; ACME CORRUGATED BOX COMPANY, INC.; ANASTASIOS MARKOS, t/a Municipal Exxon; BAY HARBOR PARK HOMEOWNER'S ASSOCIATION, INC.; BENSALEM TOWNSHIP AUTHORITY; BIG D BUILDING SUPPLY CORPORATION, *et al.*,

Private Plaintiffs,
Plaintiffs-Appellants,

and

STATE OF ALABAMA *et al.*,

Plaintiffs,

vs.

AETNA CASUALTY AND SURETY COMPANY; ALLSTATE INSURANCE COMPANY; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY, *et al.*,

Defendants-Appellees.

No. 89-16405

DC# CV-88-1688-WWS

STATE OF CALIFORNIA; CITY OF LAFAYETTE, CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SAN BENITO,

Plaintiffs-Appellants,

and

STATE OF ALABAMA *et al.*,
Plaintiffs,

vs.

AETNA CASUALTY AND SURETY COMPANY; ALLSTATE INSURANCE COMPANY; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY, *et al.*,
Defendants-Appellees.

No. 89-16513

DC# CV-88-0981-WWS

STATE OF CALIFORNIA; CITY OF LAFAYETTE; CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SAN BENITO,
Plaintiffs-Appellants,

vs.

INSURANCE SERVICES OFFICE, INC., CMA RE (U.K.) Ltd.; CONTINENTAL REINSURANCE CORPORATION; UNION-AMERICA INSURANCE CO.; EDWARDS & PAYNE Ltd.; EXCESS INSURANCE CO., Ltd.; GENERAL REINSURANCE CORP.; THOMAS A. GREENE & COMPANY, Inc.; KEMPER REINSURANCE LONDON; LLOYD'S UNDERWRITERS & BROKERS; MERCANTILE & GENERAL REINSURANCE COMPANY OF AMERICA; NORTH AMERICAN REINSURANCE CORPORATION; OXFORD SYNDICATE MGMT. Ltd.; (sued herein as K.F. Adler & Others (U.A.) Ltd.); PRUDENTIAL REINSURANCE; REINSURANCE ASSOCIATION OF AMERICA; TERRA NOVA INSURANCE CO.; AETNA CASUALTY AND SURETY COMPANY; ALLSTATE INSURANCE COMPANY; WINTERTHUR REINSURANCE CORPORATION OF AMERICA; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY,
Defendants-Appellants.

No. 89-16514

DC# CV-88-0983-WWS

STATE OF NEW YORK; ROOSEVELT ISLAND OPERATING AUTHORITY; VILLAGE OF GROTON; VILLAGE OF LAKE SUCCESS,

Plaintiffs-Appellants,

vs.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; *et al.*,

Defendants-Appellees.

No. 89-16515

DC# CV-88-0984-WWS

COMMONWEALTH OF MASSACHUSETTS; TOWN OF HANOVER; TOWN OF MILFORD,

Plaintiffs-Appellants,

vs.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; *et al.*,

Defendants-Appellees.

No. 89-16516

DC# CV-88-0985-WWS

STATE OF MINNESOTA,

Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; *et al.*,

Defendants-Appellees.

No. 89-16517

DC# CV-88-0986-WWS

STATE OF WEST VIRGINIA; CITY OF CLAY; COUNTY OF HANCOCK; COUNTY OF MINERAL; COUNTY OF WIRT,
Plaintiffs-Appellants,

vs.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; *et al.*,
Defendants-Appellees.

No. 89-16518

DC# CV-88-0987-WWS

STATE OF WISCONSIN,
Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; *et al.*,
Defendants-Appellees.

No. 89-16519

DC# CV-88-0988-WWS

CITY OF MOBILE; STATE OF ALABAMA; CITY OF BIRMINGHAM,
Plaintiffs-Appellants,

vs.

AETNA CASUALTY AND SURETY COMPANY; WINTERTHUR REINSURANCE CORPORATION OF AMERICA; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE,
Defendants-Appellees.

No. 89-16520

DC# CV-88-1009-WWS

STATE OF ARIZONA,
Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

No. 89-16521

DC# CV-88-2327-WWS

STATE OF MARYLAND,
Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

No. 89-16522

DC# CV-88-2328-WWS

STATE OF WASHINGTON; COUNTY OF COWLITZ,
Plaintiffs-Appellants,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

No. 89-16523

DC# CV-88-2329-WWS

STATE OF NEW JERSEY,
Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appelees.

No. 89-16524

CV-88-2330-WWS

STATE OF COLORADO,
Plaintiff-Appellant,

vs.

WINTERTHUR REINSURANCE CORPORATION OF AMERICA; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE, *et al.*,
Defendants-Appellees.

No. 89-16525

DC# CV-88-2331-WWS

STATE OF OHIO; TOWNSHIP OF JACKSON; COUNTY OF HARDIN,
Plaintiffs-Appellants,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

No. 89-16526

DC# CV-88-2332-WWS

STATE OF CONNECTICUT,
Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

No. 89-16527

DC# CV-88-2333-WWS

COMMONWEALTH OF PENNSYLVANIA; COUNTY OF SCHUYKILL; CITY OF ALTOONA; CITY OF YORK; BOROUGH OF CHAMBERSBURG,
Plaintiffs-Appellants,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

No. 89-16528

DC# CV-88-2334-WWS

STATE OF ALASKA,
Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

No. 89-16529

DC# CV-88-2335-WWS

STATE OF MONTANA; COUNTY OF TETON,
Plaintiffs-Appellants,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

No. 89-16530

DC# CV-88-2341-WWS

STATE OF MICHIGAN,
Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

No. 89-16531

DC# CV-88-1131-WWS

STATE OF LOUISIANA, CITIES OF BATON ROUGE, NEW ORLEANS, SLIDELL, NACHITOCHES and EUNICE,
Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY, ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

[Filed October 15, 1991]

Before: BEEZER, and NOONAN, Circuit Judges, SINGLETON,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Beezer and Noonan have voted to reject the suggestion for rehearing en banc and Judge Singleton expresses no opinion regarding the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

---

* The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

(2)

Supreme Court, U.S.
FILED
FEB 3 1992
OFFICE OF THE CLERK

No. 91-1131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WINTERTHUR REINSURANCE CORP. OF AMERICA,

Petitioner,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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STATEMENT PURSUANT TO RULE 29.1

Merrett Underwriting Agency Management Limited is wholly owned by Merrett Holdings PLC.

Three Quays Underwriting Management Limited is wholly owned by Cater Allen Holdings PLC.

Edwards & Payne (Underwriting Agencies) Limited is wholly owned by Sturge Group PLC.

No other of these respondents has any parent or subsidiary corporations within the meaning of Rule 29.1 of the Rules of the Supreme Court of the United States.

No. 91-1131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WINTERTHUR REINSURANCE CORP. OF AMERICA,

Petitioner,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondents Merrett Underwriting Agency Management Limited, Robin A.G. Jackson, Three Quays Underwriting Management Limited, Janson Green Management Limited, Edwards & Payne (Underwriting Agencies) Limited, C.J.W. (Underwriting Agencies) Limited, Lambert Brothers (Underwriting Agencies) Limited, and R.K. Carvill & Co., Ltd., respectfully submit this response in support of the *Petition for a Writ of Certiorari* in No. 91-1131, arising out of the decision of the United States Court of Appeals for the Ninth Circuit in *In re Insurance Antitrust Litigation*.

Although they are automatically deemed respondents here, these respondents, apart from the fact that they are English, are identically situated to the petitioners in No. 91-1131. These respondents are reinsurers or reinsurance brokers that, like petitioner, are accused of having conspired to restrict the terms on

which reinsurance would be offered to insurance companies and to refuse to provide reinsurance coverage unless ISO amended its proposed policy forms for primary comprehensive general liability ("CGL") insurance.[1] Like petitioner, respondents are sued for conduct in markets in which plaintiffs did not participate.

These respondents thus stand in exactly the same position vis-a-vis plaintiffs as does petitioner, and all petitioner's arguments on plaintiffs' antitrust standing are shared by these respondents. Respondents therefore support the petition for a writ of certiorari and adopt all of the arguments made therein.

[1] Some of the foreign defendants in the counts at issue in No. 91-1131 are also named in three different and discrete counts that are concerned entirely with foreign actors and conduct. Those counts allege that London market brokers and underwriters agreed on terms and conditions of reinsurance and retrocessional reinsurance they would provide for American risks. The district court dismissed those three counts, finding that to exercise antitrust jurisdiction over them would violate principles of international law and comity. In No.91-1128, the defendants in those counts have petitioned this Court for a writ of certiorari to review the Ninth Circuit's reversal of the district court's comity ruling.

CONCLUSION

The petitioner for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 14 1992
OFFICE OF THE CLERK

(1) (4) (4) (3)

Nos. 91-1111, 1128, 1131, & 1146

In The

Supreme Court of the United States

October Term, 1991

HARTFORD FIRE INSURANCE CO., et al.,

Petitioners,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether allegations that insurers' enlistment of reinsurers and others in agreements not to trade, as a means of compelling competitors to stop selling certain insurance products to American consumers, are sufficient to state a claim of "boycott, coercion or intimidation" within the meaning of section 3(b) of the McCarran-Ferguson Act.

2. Whether insurers' participation in unregulated, and, therefore, nonexempt, conspiratorial conduct even qualifies for the antitrust exemption provided by section 2(b) of the McCarran-Ferguson Act.

3. Whether, under the state action doctrine, approval of an insurance policy form developed by a trade association results in antitrust immunity for unauthorized and unsupervised marketplace activities to compel competing insurers to use the form and stop selling certain insurance products to American consumers.

4. Whether foreign reinsurers' self-regulation of some aspects of their business should preclude a federal court from exercising jurisdiction over the foreign reinsurers' anticompetitive conduct when (i) that conduct was targeted at American markets; (ii) that conduct had direct, substantial and foreseeable effects on American commerce; and (iii) no relevant regulation, foreign or domestic, compels or authorizes the anticompetitive conduct.

QUESTIONS PRESENTED – Continued

5. Whether American insurance consumers have standing to sue for injunctive relief and damages under the antitrust laws when they suffer antitrust injury to business or property as a result of a restraint of trade in the market in which they purchase insurance.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The other petitions to which this consolidated opposition brief apply are styled:

Merrett Underwriting Agency Management Limited, et al. v. State of California, et al., No. 91-1128;

Winterthur Reinsurance Corp. of America v. State of California, et al, No. 91-1131; and

Unionamerica Insurance Co. Ltd., et al. v. State of California, et al, No. 91-1146.

Governmental Plaintiffs (Respondents):

State of Alabama
State of Alaska
State of Arizona
State of California
State of Colorado
State of Connecticut
State of Louisiana
State of Maryland
Commonwealth of Massachusetts
State of Michigan
State of Minnesota
State of Montana
State of New Jersey
State of New York
State of Ohio
Commonwealth of Pennsylvania
State of Washington
State of West Virginia
State of Wisconsin
Borough of Chambersburg, Pennsylvania
City of Altoona, Pennsylvania

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT – Continued

City of Baton Rouge, Louisiana
City of Birmingham, Alabama
City of Clay, West Virginia
City of Eunice, Louisiana
City of Lafayette, California
City of Mobile, Alabama
City of Nachitoches, Louisiana
City of New Orleans, Louisiana
City of San Francisco, California
City of Slidell, Louisiana
City of York, Pennsylvania
County of Cowlitz, Washington
County of Hancock, West Virginia
County of Hardin, Ohio
County of Mineral, West Virginia
County of San Benito, California
County of San Francisco, California
County of Schuylkill, Pennsylvania
County of Teton, Montana
County of Wirt, West Virginia
Roosevelt Island [New York] Operating Authority, Inc.
Town of Hanover, Massachusetts
Town of Milford, Massachusetts
Township of Jackson, Ohio
Village of Lake Success, New York
Village of Groton, New York

Private Plaintiffs (Respondents):

Ace Check Cashing, Inc.
Acme Corrugated Box Company, Inc.
Anastasios Markos, t/a Municipal Exxon
Bay Harbor Park Homeowners' Association, Inc.
Bensalem Township Authority

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT – Continued

Big D Building Supply Corporation
Carlisle Day Care Center, Inc.
Carmella M. "Boots" Liberto, t/a R.J. Liberto, Inc.
Durawood, Inc.
Environmental Aviation Sciences, Inc.
Glabman Paramount Furniture Mfg. Co., Inc.
Henry L. Rosenfeld, t/a Mobile Check Cash
Jerry Grant Chemical Associates, Inc.
Keyboard Communications, Inc.
Kirklington Park, Inc.
Les Ray Bobcat, Inc.
P & J Casting Corp.

Defendants (Petitioners):

Allstate Insurance Company
Aetna Casualty & Surety Company
CIGNA Corporation
Hartford Fire Insurance Company
Insurance Services Office, Inc.
Reinsurance Association of America
Constitution Reinsurance Corporation
General Reinsurance Corporation
Mercantile & General Reinsurance Company of America
North American Reinsurance Company
Prudential Reinsurance Company
Winterthur Swiss Insurance Company
Thomas A. Greene & Company, Inc.
C.J.W. (Underwriting Agencies) Limited
D.P. Mann Underwriting Agency Limited
Edwards & Payne (Underwriting Agencies) Limited
Janson Green Management Limited

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT – Continued

Lambert Brothers (Underwriting Agencies) Limited
Merrett Underwriting Agency Management Limited
Murray Lawrence & Partners
Sturge Reinsurance Management Ltd.
Peter N. Miller
Robin A.G. Jackson
Three Quays Underwriting Management Limited
R.K. Carvill & Company
Unionamerica Insurance Company Ltd.
Continental Reinsurance Corporation (U.K.) Limited
CNA Re (U.K.) Ltd.
Kemper Reinsurance London, Ltd.
Excess Insurance Company, Ltd.
Terra Nova Insurance Company Limited
Ballantyne, McKean & Sullivan Limited

Private plaintiffs do not have any corporate parents or subsidiaries within the meaning of Rule 29.1.

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RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals is reported at 938 F.2d 919 (UA App. A1-A35)[1] The opinion of the district court is reported at 723 F.Supp. 464 (UA App. A36-A86).

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1991. Timely petitions for rehearing were denied on October 15, 1991. UA App. A87-A99. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in these petitions are sections 1 and 7 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 & 6a (Merrett App. A93); the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, *et seq.* (Hartford App. 98a- 99a); and sections 4 and 16 of the Clayton Antitrust Act, 15 U.S.C. §§ 15(a) & 26 (UA App. A100-A102).

STATEMENT

This case comes to this Court without the development of a factual record, in a posture in which the allegations of the plaintiffs' complaints and the reasonable inferences to be drawn from them must be taken as true.[2]

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[1] Of the four petitions filed with this Court, the appendix to the petition filed in *Unionamerica Insurance Co., Ltd., et al.*, No. 91-1146 is the most complete. Respondents' Consolidated Brief uses that appendix where possible, citing it as "UA App."

[2] *Summit Health Ltd. v. Pinhas*, 111 S.Ct. 1842, 1845 (1991). Despite its appearance before this Court, this case remains in

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Plaintiffs' allegations are reviewed by the Court of Appeals at 938 F.2d at 922-924 (UA App. A13-A18).

At its core, this case is about the enlistment of "reinsurers to compel capitulation" to the demands of a handful of firms. 938 F.2d at 929, UA App. A26. The goal of these firms was to limit the scope of insurance products sold in the United States. *Id.* More specifically, the complaints allege as follows.

In 1984, defendant primary insurers were dissatisfied with the breadth of risks covered by commercial general liability insurance policies.[3] They wanted to shrink the coverage offered in the market, but could not unilaterally cease offering the broader coverages without risking the loss of market share to competitors who remained willing to sell the broader coverage. *See, e.g.,* Conn. Cmpt. ¶¶ 65-67, UA App. A175.

Consequently, the primary insurer defendants, and the domestic and foreign reinsurers they enlisted, conspired to force unwilling competitors to stop insuring certain risks.[4] Collectively, they withdrew necessary inputs required by competing primary insurers who wanted to continue writing these risks. They agreed to withhold reinsurance from U.S. primary insurers who

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its infancy, having been confined by the trial court to motions designed to test the legal sufficiency of the pleadings. Pre-Trial Order No. 2, ¶ 3. The trial court allowed discovery "insofar as necessary for these motions" (UA App. 38, n. 2), but expressly limited that discovery to matters not likely to raise disputed issues of fact. Pre-Trial Order No. 2, ¶ 5. As a result, no discovery was conducted.

[3] Commercial general liability (CGL) insurance provides coverage against third party claims for businesses and state and local governments.

[4] For example, defendants sought to exclude all pollution coverage.

were unwilling to comply with the conspirators' demands. Without reinsurance, a critical input, the capacity of primary companies to offer coverage to their customers would be drastically eroded. Thereafter, defendant Insurance Services Office, Inc. (ISO), the trade association of primary insurers, withdrew statistical support for the risks.[5] *See, e.g.,* Cal. Cmpt. ¶¶ 63-100, UA App. A123-131.

To achieve the full goals of the conspiracy, defendants also moved to limit excess and umbrella coverage as well as property insurance coverage, to conform to changes effectuated in CGL coverages. By these coordinated steps, defendants were largely able to compel competing insurers to stop selling insurance written on policy forms that would have provided the broader coverage, and to use exclusively the lesser forms which the conspirators forced upon ISO.[6] *See, e.g.,* Cal. Cmpt. ¶¶ 101-110, UA App. A131-133.

No state insurance regulator reviewed or approved the coercive conduct that generated these lesser forms. No state insurance regulator reviewed or approved the conduct that forced the use of these forms in the marketplace. 938 F.2d at 931, UA App. A29.

As the complaints allege, the United States argued[7], and the court of appeals found, this case is about

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[5] Statistical support provides information that insurers need to price an insurance product.

[6] No state's approval of the conspirators' new policy forms constituted disapproval of older forms. Absent the conspiracy, all forms would have remained available for use in the marketplace.

[7] The United States filed a brief as *amicus curiae* in the court of appeals. In its brief, the United States argued that (i)

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agreements by a few primary insurers and reinsurers to replace existing insurance products with a lesser quality product, and the enforcement acts taken by defendants to compel the market success of the lesser product. Defendants' enforcement acts, most notably the withholding of necessary reinsurance and statistical support services, are central to this case. Defendants used these economic weapons to force unwilling firms to stop offering higher quality insurance products to American consumers.

MISSTATEMENTS IN THE PETITIONS.

The petitions contain numerous contradictions and misstatements of fact. In compliance with Supreme Court Rule 15.1, plaintiffs note the following major misstatements in the petitions:

1. The Hartford petition describes this case as involving "nothing more" than "agreements among" insurers and reinsurers "over coverage risks they were willing to accept". Hartford Ptn. 2. This case, however, involves "much more." 938 F.2d at 929, UA App. A25. The complaints expressly allege that primary insurer defendants met with reinsurers to formulate and set in a motion a joint strategy to eliminate specific coverages from the market. *See*, e.g., Conn. Cmpt. ¶¶ 68, 69, 73, UA App. A175-A177. The complaints also allege that, in furtherance of this goal, reinsurers "threaten[ed] to withhold

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the complaints allege conduct constituting boycott, coercion or intimidation under the McCarran-Ferguson Act; (ii) the state action doctrine does not prohibit antitrust scrutiny of the alleged boycotts; and (iii) principles of international comity do not preclude judicial review of these cases. The decision of the Court of Appeals is in accord with these arguments.

reinsurance from the market for primary companies" that persisted in offering this coverage (Cal. Cmpt. ¶ 71, UA App. A124); reinsurers "threatened a boycott of North American CGL risks unless" the coverages were eliminated (Cal. Cmpt. ¶ 74, UA App. A125); reinsurers collectively refused to cover certain risks (Cal. Cmpt. ¶¶ 95 & 108, UA App. A130 & A133); and ISO withdrew support services for coverages that included these risks. Conn. Cmpt. ¶ 103, UA App. A183-A184; *See also* Conn. Cmpt. ¶ 116-117, UA App. A186-A187; 938 F.2d at 929, UA App. A25. The Winterthur petition even concedes that plaintiffs alleged that primary insurers "induced defendant reinsurers to refuse to provide reinsurance to insurers writing CGL policies on existing ISO forms." Winterthur Ptn. 3.

2. The Hartford petition asserts that states sanctioned the defendants' activities because "state law authorized collective forms development". Hartford Ptn. 27. States, however specifically prohibit boycotts, which is the conduct at issue in these cases. *See e.g.*, Md. Ann. Code Art. 48A, § 220 (1986); N.J. Stat. Ann. 17:29B-4(4) (1985); *See also* UA App. A61. As the Ninth Circuit found, the challenged conduct "was neither a reasonable nor necessary consequence of the conduct regulated and approved by the state." 938 F.2d at 931, UA App. A30.

3. The Hartford petition asserts that "state agencies made substantive determinations of conformity with state policy." Hartford Ptn. 28. The regulators reviewed forms, not market conduct. As the court of appeals found, nothing in the evidence shows that the relevant states supervised or approved the boycotts used to produce agreement on the content or use of the forms. 938 F.2d at 931, UA App. A29.

4. The Hartford petition asserts that insurance and reinsurance markets are so intimately entwined that state regulation of primary insurers is *de facto* regulation of

reinsurers. Hartford Ptn. 15. The Winterthur petition, on the other hand, states that it "strains credulity" to suggest that activities in one market, including boycotts, affect any other market. Winterthur Ptn. 19-20.

5. The Merrett and Unionamerica petitions state that the Ninth Circuit "dismissed" the global conspiracy claim in the Connecticut-style complaints. Merrett Ptn. 4, n. 2; Unionamerica Ptn. 6-7, n. 6. The Ninth Circuit found this count "consistent" with its opinion and mandated that "[o]n remand to the district court, plaintiffs should be afforded the opportunity to amend" to cure a technical pleading defect. 938 F.2d at 931, UA App. A30.

REASONS FOR DENYING THE WRIT

The court of appeals decision does not warrant review. Defendants' real challenge is not to the legal standards applied by the court of appeals. Rather, defendants contest the court of appeals' construction of the facts of these cases as alleged in plaintiffs' complaints. Still seeking to mischaracterize those allegations, defendants seek certiorari on questions not presented by this case.

In resolving the questions actually presented by plaintiffs' allegations, the decision below is faithful to this Court's prior interpretations of the McCarran-Ferguson Act and the state action doctrine. The decision also accords with this Court's articulated principles of international comity and standing. It accords as well with the decisions of other circuits.

In no respect does the case present questions of exceptional legal and practical importance. Defendants cannot seriously contend that the egregious conduct described in plaintiffs' complaints must be countenanced to assure the survival of the insurance industry. No basis for certiorari has been presented.

The decision below concerned motions brought under Federal Rules of Civil Procedure 12(b) and 56 to "test the validity of . . . critical allegations in the complaint[s]." RT at 21 (June 23, 1988). No discovery was conducted in advance of these motions. Nevertheless, at this early stage of the litigation, defendants continue to press a view of the case that differs categorically from the view of plaintiffs. Disputes over case characterization provide no basis for certiorari. Defendants have stated no reasonable basis for review of the decision of the court of appeals and, on the limited factual record before this Court, there is no basis for review.

I. THIS CASE PRESENTS NO OPPORTUNITY TO CLARIFY THE REACHES OF THE MCCARRAN-FERGUSON ACT.

The McCarran-Ferguson Act "embod[ies] a legislative rejection of the concept that the insurance industry is outside the scope of the antitrust laws." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 220 (1979). In striking a balance between competition and regulation, the Act exempts from antitrust scrutiny conduct that is the business of insurance and is regulated by the state. 15 U.S.C. § 1012 (b). Otherwise qualified conduct is denied this exemption, however, if it constitutes an agreement or act of boycott, coercion or intimidation. 15 U.S.C. § 1013 (b). These cases allege boycott, coercion and intimidation. Further, these cases allege participation by domestic insurers in unregulated foreign reinsurance activity – conduct that does not even qualify for the McCarran exemption in the first instance. Delicate questions of balance do not arise. The antitrust laws apply.

The court of appeals' holdings on the McCarran-Ferguson Act defenses are unsuited to review by this Court. They present numerous issues, each of which this

Court would need to resolve in defendants' favor before the outcome of these cases would change. Defendants have asked this Court to reject the court of appeals' reading of the complaints; to reverse the court of appeals' opinion that the challenged conduct is a boycott under the McCarran Act; and to reverse the court of appeals' conclusion that the McCarran Act does not shield conspirators' participation in nonexempt conduct. These issues are fact-bound. Moreover, each was resolved below based on conventional applications of legal principles established by this Court.

A. Defendants' petition for certiorari asks this Court to reject the definition of boycott expressed in *St. Paul Fire & Marine Insurance Co. v. Barry*, and used by this Court throughout its history.

The court of appeals observed the clear line between conduct constituting an actionable boycott and conduct constituting permissible joint activity. It correctly found, 938 F.2d 929; UA App. A27, as the United States had urged in its *amicus curiae* brief at 16, that the conduct alleged in this case falls well on the boycott side of the distinguishing line.

The court of appeals' decision rested squarely on *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978), this Court's explanation of the boycott exception in the McCarran-Ferguson Act. In *Barry*, this Court surveyed the long line of Supreme Court precedent giving rise to a "common understanding" of the term boycott. *Barry*, 438 U.S. at 541-45. The court of appeals found that the plaintiffs' allegations fit "exactly" within this common understanding. 938 F.2d at 929, UA App. A26. In its brief *amicus curiae*, the United States had urged that result, commenting that

> the combination of primary insurers and reinsurers alleged by plaintiffs falls well within the 'common understanding' (*Barry*, 438 U.S. at 552) of boycott, coercion or intimidation. Indeed, it is precisely the kind of conduct characterized as a boycott, coercion and intimidation in the Sherman Act case that led to the passage of the McCarran-Ferguson Act and with which Congress was specifically concerned when it included [the boycott exclusion in the McCarran-Ferguson Act].

Brief for the United States as *amicus curiae*, filed below, at 16.[8]

Defendants, however, attempt to manufacture a controversy from the colloquy between the majority and dissent in *Barry*. Yet, the majority and dissent in *Barry* would agree that the facts presented here constitute a

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[8] The legislative history of the McCarran-Ferguson Act demonstrates that Congress carefully distinguished voluntary agreements among insurers on policy terms – which could claim antitrust immunity if regulated by the state – from combinations designed to force unwilling competitors to adhere to terms through the concerted denial of necessary trade relationships – which were expressly denied immunity. *Barry*, 438 U.S. at 547-50. Indeed, the Act recognizes that "the vice in the industry was not that there were rating bureaus, but that there was in the industry a system of private government which had been built up by a small group of insurance companies." *Barry*, 438 U.S. at 548, quoting Senator O'Mahoney. Senator O'Mahoney describes as "absolutely" unprotected "any attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which is attempting to do business in the insurance field in any way that was disapproved by them. . . . " 91 Cong. Rec. 1480 (1945) (Statement of Senator O'Mahoney). The central allegations of the complaints concern these kinds of prohibited agreements.

boycott. The majority in *Barry* described a boycott as "[t]he enlistment of third parties in an agreement not to trade, as a means of compelling capitulation of the boycotted group. . . . " *Barry*, 438 U.S. at 544-45. The dissent in *Barry* chose different words, but approved the same concept, concluding that *McCarran* boycotts concern "attempts by members of the insurance business to force other members to follow the industry's private rules and practices." *Barry*, 438 U.S. at 565.

Thus, the *Barry* majority and minority agree on a bright line test. Whatever else a McCarran boycott may be, it indisputably includes what is alleged here: agreements and acts to withhold an essential input from other insurers as means of forcing their acquiescence. The court of appeals' application of *Barry* was conventional and correct.

Grasping at straws, defendants claim that a McCarran-Ferguson boycott does not exist unless "competing insurance companies [are] absolutely excluded from the market" or there is a "total refusal to deal on any terms". Hartford Ptn. 24. This Court has never required such a finding. Indeed, the case that served as the model for the boycott exception in the McCarran-Ferguson Act, *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 535 (1944), involved neither situation.

South-Eastern Underwriters involved a conditional refusal to deal.[9] The facts of *South-Eastern Underwriters* are markedly similar to those involved here. Both cases

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[9] So-called "conditional" refusals are classic boycotts. *E.g.*, *Fashion Originators Guild v. FTC*, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U.S. 600 (1914). These boycotts are not designed to drive competitors from the market. Rather, they are designed to force unwilling competitors to adhere to particular terms of trade.

concern conspirators who refused to deal in order to force unwilling competitors to acquiesce to their terms. In both, reinsurance was withdrawn as the means of forcing acquiescence. Both allege conduct falling well within the common understanding of boycott.

Defendants refer to a "debate" in which some lower courts attempt to distinguish between refusals to deal on any terms (absolute refusals) and refusals to deal on some terms (partial refusals). They would classify only the former as a boycott. This debate is not pertinent here because it only concerns consumer boycotts.[10] The present case does not allege consumer boycotts. It alleges concerted refusals to deal to force competitors to adopt conspirators' trade restrictions.[11]

Some lower courts may seek to confirm that a particular consumer boycott is coercive by inquiring into the absolute or partial nature of the refusal to deal. However, a boycott to force a competitor to adhere to trade terms dictated by conspirators is by definition coercive.[12] Thus,

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[10] The cases cited by defendants as holding that an absolute refusal to deal is essential are consumer boycott cases. *See Grant v. Erie Ins. Exchange*, 542 F. Supp. 457 (M.D. Pa. 1982), *aff'd mem.*, 716 F. 2d 890 (3d Cir.), *cert. den.*, 464 U.S. 938 (1983) and *UNR Industries Inc. v. Continental Ins. Co.*, 607 F. Supp. 855 (N.D. Ill. 1984).

[11] Defendants' citation to 9 E. Kintner & J. Bauer, *Federal Antitrust Law* 245 (1989) is, thus, curious. Kintner & Bauer distinguish consumer boycott cases from those where "a partial or conditional refusal to deal . . . is designed to coerce the target to conform to certain conduct." In the latter situation, Kintner & Bauer note the lack of conflict among lower courts, citing the overwhelming majority of cases holding that an absolute refusal to deal is not required. *Id.* at 245-46.

[12] Contrary to defendants' assertions, this case is not about ordinary course-of-business arrangements against which

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courts confronting boycotts against competitors have not used, and need not use, the elusive distinction between partial and absolute refusals to deal to corroborate coercion.

Decided well within the contours of the "common understanding" of boycott, this case simply presents no opportunity for this Court to test the reaches of its definition of boycott under the McCarran-Ferguson Act.

B. Defendants' exemption forfeiture arguments actually seek to expand the scope of the limited antitrust exemption established by the McCarran-Ferguson Act.

As an additional and independent ground for denying McCarran-Ferguson protection to the defendants' conduct, the court of appeals held that the Act's protection did not extend to the domestic defendants' participation in unregulated agreements with the foreign defendants.[13] Relying on *Beltz Travel Service v. International Air Transport Assn.*, 620 F.2d 1360 (9th Cir. 1980), the

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other insurers found it difficult or expensive to compete. This case is about one group of competitors (defendant primary insurers) seeking to discipline another group of competitors (the unwilling primary insurers) by inducing suppliers (reinsurers and ISO) not to provide necessary supplies (reinsurance and statistical support) unless the unwilling primary insurers acceded to the trade terms of the defendant primary insurers. Thus, there is no necessity in this case to distinguish between "economic exigencies" that flow from the need to respond to protected horizontal agreements and "coercion." The facts as alleged are well within the traditional concept of a boycott.

[13] Petitioners do not challenge the court of appeals' holding that the conduct of the foreign reinsurers fails to qualify for the McCarran exemption because it is not regulated by the states.

court of appeals found an "exemption forfeiture" as a result of domestic insurers' joining in the unregulated (and therefore non-exempt) conduct of foreign reinsurers.

In its holding, the court of appeals applied well-accepted principles. First, "[i]t is well settled that exemptions from the antitrust laws are to be narrowly construed." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979).[14] Second, there is nothing novel about holding an otherwise exempt entity liable when it conspires in non-exempt conduct. For example, in the labor exemption context, this Court has stated:

> A union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. . . . But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it had agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry *and the union is liable with the employers if it becomes a party to the conspiracy.*

Mine Workers v. Pennington, 381 U.S. 657, 665-66 (1965) *quoted in Royal Drug*, 440 U.S. at 232, n.39 (emphasis added).[15]

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[14] *See, e.g., Abbott Laboratories v. Portland Retail Druggists Assn.*, 425 U.S. 1, 11-12 (1976); *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 622 (1975); *FMC Corp. v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956).

[15] Defendants claim that the court of appeals exemption forfeiture decision is contrary to *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982). Hartford Ptn. 16. However, there is

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The record as it currently stands provides no basis for a reconsideration of these long-standing principles. The line between exempt and non-exempt conduct can best be drawn on a well developed factual record, and not on the bare allegations of even a well-pleaded complaint.

Moreover, defendants' exemption forfeiture argument would expand the limited exemption established by the McCarran-Ferguson Act. There is no legal justification for doing so.

The present record fails to indicate in anyway that the insurance industry will become less efficient if this Court fails to expand the McCarran exemption to include insurer conspiracies involving unregulated foreign reinsurance activity. The unavailability of the McCarran

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nothing in *Pireno* that is inconsistent with the decision below. In *Pireno*, this Court considered the factors for determining what is the "business of insurance" under the McCarran Act, and noted that involvement of non-insurance companies in challenged conduct does not necessarily disqualify conduct from being characterized as the "business of insurance." This discussion is not relevant to the present cases, however, because the exemption forfeiture analysis of the court of appeals rested on the "state regulation" prong of the McCarran Act, and not on "the business of insurance" requirement. In short, the court of appeals' unchallenged finding is that the foreign reinsurers' conduct fails to qualify for the McCarran exemption because it is not state regulated. 15 U.S.C. § 1012(b). In finding that the domestic insurers also had no McCarran exemption, the court of appeals below followed this Court's precedent making all conspirators liable for the unlawful acts of their co-conspirators. *See, e.g., Mine Workers v. Pennington*, 381 U.S. at 665-66; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54 (1948).

exemption does not automatically impose antitrust liability on insurers for joint conduct with foreign reinsurers. If an insurer has no exemption with respect to certain conduct, that conduct simply becomes subject to antitrust scrutiny, not necessarily antitrust liability.[16]

Moreover, most companies have no trouble discerning the difference between lawful agreements regarding the supply of important inputs and unlawful agreements to deny competitors such inputs unless the competitors accept particular terms of doing business. The court of appeals' decision leaves insurers free to purchase reinsurance but properly warns them against using such arrangements as exclusionary devices directed against competitors.

The insurance industry ought not be surprised or confused by the court of appeals' ruling. Reinsurers have long regarded themselves as being without antitrust exemption, and have generally conducted their business accordingly.[17] Certainly, primary insurers cannot claim to

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[16] Agreements between insurers and reinsurers are akin to purchase and sale agreements between vertically related firms in any other industry. Reinsurance is an input into insurance, the finished product. An insurer purchasing reinsurance is like Chrysler purchasing steel. Both transactions secure inputs into the finished product. Neither transaction is ordinarily an antitrust violation.

[17] N. David Thompson, president and chief executive officer of Defendant North American Re, expressed this view in *Forum*, a publication of the American Bar Association:

> Reinsurers have generally conducted their operations free from the type of regulation to which primary insurers are subject in most jurisdictions. Reinsurance rates are not approved or filed. Reinsurance treaty provisions are not governed by statute or regulation, except for special matters such as

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be hamstrung in their ordinary operations because the court in this case followed settled law and refused to expand an antitrust exemption to include the egregious conduct alleged in the complaints. The McCarran-Ferguson Act has never protected the conduct challenged in these complaints.

II. THE DECISION BELOW RESTS ON A CONVENTIONAL APPLICATION OF THE STATE ACTION DOCTRINE.

This Court has repeatedly held that the state action doctrine immunizes the conduct of private persons from antitrust scrutiny only when that conduct is: (1) undertaken pursuant to a clearly articulated and affirmatively expressed state policy; and (2) actively supervised by the State. *California Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) ("*Midcal*"). This two-pronged test assures that the challenged anticompetitive conduct is that of the State itself. *Patrick v. Burget*, 486 U.S. 94 (1988). Contrary to defendants' assertion that the court of appeals did not apply "the *Midcal* criteria," Hartford Ptn. 9, the court faithfully applied these criteria. Defendants simply failed to meet the requirement of either prong of the test.

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> the nearly universal insolvency clause. . . . Thus, reinsurers have been outside the protection of the McCarran Act and so, at least, since the decision in the *South Eastern Underwriters* case, they are fully exposed to the enforcement of the antitrust laws, state as well as federal. (Footnote omitted.)

N. David Thompson, *Critical Issues of the Eighties: How Trends in Reinsurance Will Affect Legal, Legislative, and Regulatory Actions*, 16 Forum 1038, 1055 (1980-1981).

First, defendants' conduct was not authorized by any state policy. Indeed, state unfair insurance practices laws expressly prohibit boycotts. See, e.g., Md. Ann. Code Art. 48A, § 220 (1986). N.J. Stat. Ann. 17:29B-4(4) (1985). Second, as the court of appeals found, there is nothing in the record to demonstrate that states supervised or approved the boycotts alleged. 938 F.2d at 931, UA App. A29. Moreover, because some of the anticompetitive acts occurred *after* the approval of policy forms, supervision was impossible.[18] This case presents no issue as to either prong of *Midcal*, and, therefore, no basis for certiorari.

Defendants argue that if states have a clearly articulated policy of permitting joint forms development, then they implicitly have a clearly articulated policy permitting all behind-the-scenes coercive activity that might conceivably be related to the creation and use of a particular form. This argument would expand the state action doctrine to immunize agreements denying competitors access to essential inputs, and the boycotts implementing those agreements, even absent any evidence of public authorization, approval or supervision of the agreements and boycotts. Such an expansion of the state action doctrine would be completely at odds with the decisions of this Court.

In *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978), this Court summarily rejected the defendants' approach. There, four medical malpractice insurance companies agreed that three would not sell insurance to doctors in Rhode Island in order to force

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[18] For example, a key boycott allegation of the complaints is the withdrawal of support for competing ISO forms. Conn. Cmpt. ¶¶ 101-104, UA App. A183-A184; *See also* Cal. Cmpt. ¶¶ 97-100, UA App. A131. As defendants admit, this was not accomplished until "more than a year after the approved 1986 forms had become effective." Hartford Ptn. 6.

them to accept new coverage terms set by St. Paul, the fourth insurer. There, as here, defendants had filed forms with state insurance regulators related to the boycotted coverages. Nevertheless, this Court found no suggestion that the State had authorized the concerted refusals to deal with St. Paul's policyholders. *Barry*, 438 U.S. at 554, n. 26.

The court of appeals adopted the same reasonable distinction in the present case. Approval of policy forms is not approval of market boycotts. The conduct of defendants in these cases "was neither a reasonable nor necessary consequence of the conduct regulated by the state." 938 F.2d at 931, UA App. A30. Defendants simply fail to meet either prong of the *Midcal* test. No further review is warranted.

Because the facts of this case are so unaccommodating, defendants seek to recast them as mere forms development. Operating within this distorted construct, defendants focus on the process by which ISO drafts and obtains approval for insurance forms. But, contrary to defendants' characterization, this case alleges marketplace activities directed at an insurers' individual decision what coverage to offer.

Review is also inappropriate on the present undeveloped record. In support of their summary judgment motion, defendants relied upon the affidavit of Carole Banfield.[19] The Banfield affidavit merely asserts that reinsurers expressed their views on proposed coverages.[20]

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[19] Defendants also submitted an appendix of state insurance statutes.

[20] At its most forceful, the affidavit states:

> ISO and the insurance regulators also discussed the proposed new forms with other interested parties, including insurers, agents, brokers, domestic

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Nothing in this affidavit, or anywhere else in the record, suggests that the various agreements and their attendant boycotts were ever submitted for regulatory review and approval in any of the states subject to the state action motion. 938 F.2d at 931, UA App. A29. Nothing in this affidavit or anywhere else in the record supports a finding that any state regulator actively supervised these activities.

Contrary to defendants' hyperbole, the decision of the court of appeals will not create a crisis in federalism. Nowhere do the complaints attack or even question the regulatory acts of state officials. Accordingly, defendants' invocation of this Court's recent decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S.Ct. 1344 (1991), is misplaced.

What plaintiffs do challenge are back-room deals, unknown and unapproved by regulators, to force unwilling companies to toe a line drawn by a handful of powerful firms. Open comment and debate are not at issue in these cases. If these boycotts are immune from antitrust scrutiny simply because state regulators see some public manifestation of the boycott, private regulation of the insurance industry by a few firms will supplant public regulation. By deterring these boycotts and forcing full and fair use of state regulatory processes, the court of appeals acted to strengthen state regulation, not to supplant it.

(Continued from previous page)

and foreign reinsurers, and corporate risk managers. The discussions were sometimes heated and the industry-wide scrutiny was intense. Banfield Afft. ¶ 9 at 5.

III. THE DECISION TO EXERCISE JURISDICTION IN THIS CASE PROPERLY APPLIES SETTLED PRINCIPLES OF INTERNATIONAL COMITY.

A. This Case Provides No Occasion to Refine the General Principle Favoring the Exercise of Jurisdiction Where American Effects are Direct, Substantial and Foreseeable.

As a general principle, "[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990).[21] This strong presumption in favor of the exercise of jurisdiction may nonetheless be overcome and principles of comity may come into play where the interests of, and links to, the United States are attenuated. *Timberlane I*, 549 F.2d 613. *See also, Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 949 (D.C. Cir. 1984). Such is not the case here. The anticompetitive effects of the defendants' conduct in the United States

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[21] Although *Kirkpatrick* is an act of state case, its powerful logic applies to this case as well. Moreover, its analysis stems from the same roots as the comity doctrine. *Compare* Restatement (Third) of Foreign Relations 443, comment a [The act of state doctrine has two policy bases: "deference to the executive branch and avoid[ing] disrespect for foreign states"] *with Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 612 (9th Cir. 1976) (*Timberlane I*), *after remand*, 749 F.2d 1378 (9th Cir. 1984) (*Timberlane II*), *cert. denied*, 472 U.S. 1032 (1985) ["Only respect for the role of the executive and for international notions of comity and fairness limit [the] constitutional grant" of power that enables American courts to protect Americans from foreign actions that have anticompetitive effects in the United States].

were direct, substantial and foreseeable[22]; the action of the foreign government creates no true conflict with American antitrust laws.

The lower courts have had occasion to articulate when principles of international comity require abstention from the exercise of jurisdiction.[23] *Timberlane, supra; Laker Airways, Ltd., supra; Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). These articulations derive from the venerable *Alcoa* "effects" test. *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416 (2d Cir. 1945) (sitting by certification of this Court).[24] The minor variations in these articulations are of no moment in the present case.[25] To the contrary, a court

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[22] As both courts below found, the complaints explicitly allege conduct with a "direct, substantial and reasonably foreseeable" impact on American commerce. 723 F.Supp. at 486, UA App. A73; 938 F.2d at 932, UA App. A31.

[23] *Kirkpatrick* cautions against treating such principles as "doctrines unto themselves" and thereby "expanding judicial incapacities." 493 U.S. at 409.

[24] Under *Alcoa*, "a state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." *Alcoa*, 148 F.2d at 443. The conduct should, however, "significantly" or "directly" affect the United States commerce or be intended to have that effect. This Court cited *Alcoa* with approval in *Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 705 (1962).

[25] Defendants argue that the court of appeals' *Timberlane* analysis was wrongly "constrained" by reference to the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a. This misstates the use to which the court of appeals put the FTAIA. Indeed, it simply concluded that its *Timberlane* analysis should be informed, but not superseded, by the "direct, substantial and foreseeable effect" standard articulated in the FTAIA. 938 F.2d at 932; UA App. A31. Thus, the

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would exercise jurisdiction over the facts of this case under any recognized comity test.[26]

The conduct challenged in this case has its principal effects in the United States. The complaints allege a complex and overlapping pattern of conspiratorial activity engaged in by both foreign and domestic actors that targeted United States markets. Initially conceived by the American domestic primary insurer defendants, the conspiratorial scheme sought to limit the number of insurance products offered to insurance consumers in the United States. Foreign and domestic reinsurers were recruited as parties necessary to guarantee that unwilling American competitors would comply with the scheme.

The integral involvement of domestic companies in the scheme to withhold reinsurance belies any notion that such activity was "wholly foreign." 938 F.2d at 932, UA App. A33. Only by ignoring the overarching American focus of the complaints can defendants represent that their motion to dismiss on comity grounds involves solely British actors in British markets. Merrett Ptn. 3-4.[27]

(Continued from previous page)

court of appeals concluded: "as the [FTAIA] does not eliminate comity, a court should look to see if the case before it is one in which comity still has a role to play." *Id.*, UA App. A32. This is precisely what the court of appeals did here.

[26] The *Timberlane* balancing test employed by the court of appeals is the one most favorable to defendants. Defendants, notably, do not claim that any other circuit court of appeals would have reached a different result.

[27] The so-called "global claim" for relief in the complaints of many plaintiffs explicitly alleges that all defendants participated in a single, overarching conspiracy. Conn. Cmpt. ¶¶ 115-119, UA App. A188-A190. While the court of appeals

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Moreover, the complaints expressly allege that foreign and domestic reinsurers entered into a written agreement to use their "best endeavors to ensure that all U.S.A. and Canadian exposed insurance/reinsurance business attaching on or after 1st January, 1987, will only be written where the original business includes a seepage and pollution exclusion wherever legal and applicable." Conn. Cmpt. ¶ 112, UA App. A185-A186; Cal. Cmpt. ¶ 108, UA App. A133. This clear focus on American commerce justifies the decision of the court of appeals to exercise jurisdiction.[28]

At the very most, defendants have only raised factual disputes as to whether the conspirators were exclusively foreign nationals and whether the relevant anticompetitive conduct occurred exclusively abroad.[29] Jurisdiction

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recognized that the trial court had properly dismissed that claim on a narrow technicality of pleading, it directed the trial court on remand to allow plaintiffs an opportunity to cure that deficiency by amendment. 938 F.2d at 931, UA App. A30. Defendants' claim that those allegations were simply dismissed, Merrett Ptn. 4, n. 2, is misleading.

[28] Urging that jurisdiction be exercised, the United States as *amicus curiae* below commented that "[i]nternational comity principles do not mandate automatic deference to the domestic law or jurisdiction objections of foreign states . . . where the conduct challenged has its competitive effects principally in the United States." Brief for the United States of America as *Amicus Curiae*, at 27. In fact, the United States contended that the district court "failed to accord adequate weight to the fact that the competitive effects of the alleged conspiracy were felt primarily within the United States or to the resulting interest of the United States in enforcing its law." *Id.*

[29] No discovery preceded this Rule 12(b)(1) motion and there is no factual record beyond the face of the complaints

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should not be denied on the mere assertion of these factual disputes.

B. No Genuine Conflict Exists Between United States and United Kingdom Law.

In an attempt to counterbalance the compelling reasons for the exercise of jurisdiction, defendants claim that the British "tradition of self-regulation" creates an international conflict of sufficient scope to warrant denying jurisdiction in these cases. Defendants do not suggest that British law requires the foreign defendants to take actions forbidden by American law, that British law forbids what American law requires, nor even that compliance with American antitrust law would substantially interfere with the foreign defendants' mode of conducting business at home and within the European economic community. Merrett Ptn. 6, n. 4. They point to no inconsistency between American antitrust law and the United Kingdom's Competition Act of 1980 or Article 85(1) of the Treaty of Rome, governing competitive practices in the EEC.[30]

The supposed conflict is in reality nothing more than a dispute about the propriety of subjecting British subjects to the jurisdiction of American courts and

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that can be evaluated to conduct comity analysis. See *Timberlane I* and *Timberlane II, supra* (decided only after substantial discovery and on a full factual record).

[30] Defendants do not here, nor did they below, cite any statute, regulation or court decision to show that English law requires, or even acquiesces in, the conduct challenged by plaintiffs.

interfering with a British tradition of self regulation.[31] The conflict asserted is manifestly insufficient to overcome the interest of the United States in enforcing its own law.

IV. PLAINTIFFS HAVE STANDING AS CONSUMERS IN THE MARKET RESTRAINED BY THE REINSURER BOYCOTTS.

Reinsurers have filed two separate petitions[32] arguing that plaintiffs lack standing to pursue certain claims against them. Both petitions are based upon a fundamental mischaracterization of plaintiffs' complaints. To obscure plaintiffs' unquestionable standing as consumers in the market restrained by reinsurer boycotts, the petitions focus attention on activities in the reinsurance market. Plaintiffs' complaints plainly allege, however, that the reinsurers' boycotts restrained the *primary insurance* market in which the plaintiffs are consumers. Cal. Cmpt. ¶¶ 112, 117, 122 & 127, UA App. A134, A136, A137, A139; Conn. Cmpt. ¶¶ 116 & 121, UA App. A186 & A188. The

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[31] Defendants have effectively asked this Court to show greater deference to the supposed regulatory interests of the United Kingdom than to the regulatory interests of one of the states of this country. If the two-pronged *Midcal* test were applied to the conduct of foreign defendants, no immunity would attach. The boycott conduct at issue here is neither permitted by British law, Pet. at 6, n.4, nor actively supervised by the British government.

[32] These are: 1. Docket No. 91-1131 (Winterthur Reinsurance Corp of America); and 2. Docket No. 91-1146 (Unionamerica Insurance Co. Ltd. et al.).

plaintiffs, thus, have standing as consumers that have been injured by the elimination of competing insurance products in this market.[33]

A. Plaintiffs Meet This Court's Test for Standing.

These petitions do not warrant review by this Court because the court of appeals decided the standing issues in these cases strictly in accordance with this Court's decisions in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) (*AGC*); and *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982).

AGC involved a boycott allegedly organized by building contractors to coerce prospective developers to use nonunion contractors instead of union contractors. This Court acknowledged that both the developers and the union contractors would have had standing to challenge the boycott because "their injuries would be direct." 459 U.S. at 541.[34]

Thus, *AGC* established that those upon whom the immediate pressure of a boycott falls (developers) and

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[33] Regardless of their standing as insurance purchasers, the state plaintiffs also have standing to seek injunctive relief as common law *parens patriae* on behalf of their respective citizens. *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1944). Because citizens in each state have suffered antitrust injury, even as defined by defendants in their standing petitions, nothing in this Court's opinion in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), would limit the states' *parens* authority in these cases. See *California v. American Stores Co., Inc.*, 495 U.S. 271 (1990).

[34] However, the mere employees of these victims (or the union which represents them, the plaintiff in *AGC*) would not have standing.

their suppliers (union contractors) whose goods or services have been diminished in value because of the boycott each have standing to recover antitrust damages.

This principle is fully consistent with the Court's prior decision in *McCready*. There, both the psychologists who felt the immediate pressure of a boycott and the patients who purchased the boycotted product, psychological services, had standing to sue. *McCready*, 457 U.S. at 469 n.4, 478-81. In *McCready*, the patient was considered "the direct victim of unlawful coercion." *AGC*, 459 U.S. at 540, n.44. Indeed, to the extent that there might be a difference between suppliers to the direct boycott victim (the union contractors in *AGC*) and purchasers from the direct boycott victim (the patient in *McCready*), the courts have tended to favor the latter. See P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 340.1d (1991 Supp.).

In the instant case the initial victims of the boycott are non-defendant primary insurers who were coerced by reinsurer and primary insurer defendants. Plaintiffs are purchasers of the diminished insurance products sold by the defendant primary insurers and their victims, competing, non-defendant primary insurers. Plaintiffs, thus, are in the same position as the patient in *McCready* and are in an analogous position to the union contractors in *AGC*.

B. This Case Does Not Challenge the Boundaries of Standing Doctrine.

In *AGC* this Court established a multi-factor test for standing.[35] As to the claims for damages, each petition

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[35] The *AGC* factors are: the intent of the conspirators (459 U.S. at 537); the causal connection between the violation alleged and harm claimed (*id.*); the nature of plaintiffs' injury,

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advocates a different formulation of that test. Review is not warranted, however, because plaintiffs have standing under either formulation for both damages and injunctive relief.[36]

The Winterthur petition argues that plaintiffs must satisfy all of the *AGC* factors to have standing. The decision below correctly holds that plaintiffs satisfy each factor for all claims. The court of appeals noted that the "character-of-damages" factor as applied to the reinsurer-only claims presented some problems of damage allocation tending against standing for these claims. However, even as to that factor the court of appeals held that, on balance, the factor "is in favor of standing." 938 F.2d at 926, UA App. A20.

Furthermore, the global conspiracy claim[37] overcomes any "character-of-damages" concerns. Under the

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i.e., antitrust injury (*id.* at 538); the directness or indirectness of the claimed injury in the chain of causation (*id.* at 540-541); existence of a better class of plaintiffs (*id.* at 542); and whether the damages claimed are either speculative in terms of causation or duplicative (*id.* at 542-545).

[36] *Cargill* recognizes important differences between damages and injunctive remedies and holds that "some" *AGC* factors "are not relevant under § 16," i.e. factors addressing multiple lawsuits and duplicative recoveries. *Cargill*, 479 U.S. at 111 n.6.

[37] The Unionamerica petition does not challenge plaintiffs' standing under the global conspiracy claim, but misleadingly refers to it as "dismissed." UA Ptn. 6-7, n.6. The court of appeals granted plaintiffs leave to amend that claim to cure technical problems. See n.27, *supra*. The Winterthur petition concedes the continued vitality of the claim, but apparently contends that the Court should ignore direct purchases from coconspirators and deny standing. Winterthur Ptn. 20 n.8.

global claim, the reinsurers are coconspirators of the defendant primary insurers from which plaintiffs made direct purchases. *See Arizona v. Shamrock Foods*, 729 F.2d 1208 (9th Cir.), *cert. denied*, 467 U.S. 1252 (1984); *Fontana Aviation v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980). When a plaintiff purchases directly from a named coconspirator of an antitrust violator, none of the policy concerns of *Illinois Brick*[38] are implicated. P. Areeda & H. Hovenkamp, *Antitrust Law* § 337.2e (1991 Supp.). Any issues of duplicative liability and allocation can be resolved because all potentially conflicting claimants are joined in the litigation. In light of plaintiffs' standing to sue defendants under the global claim, a fragmented review of the reinsurance-only claims would be premature and potentially futile.

The Unionamerica petition argues that "directness" and "the nature of the injury" are separate and independent limitations on standing. Because the court of appeals correctly held that plaintiffs satisfied both requirements, consideration of this question should await a case in which one of the two elements, and, therefore, the outcome of the case, is in doubt.

C. Plaintiffs Suffered Distinct Injuries.

Defendants' suggestion that the damages sought by the plaintiffs in these cases are either speculative or duplicative is simply without merit. The speculativeness referred to in *AGC* only relates to causation of injury and not to its quantification. *AGC*, 459 U.S. at 542 ("the

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[38] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

alleged effects on the Union may have been produced by independent factors").

The danger of duplicative recoveries does not exist here. This is not a passing-on case where there will be "conflicting claims to a common fund," *id.* at 544, that might give rise to concerns similar to those in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The boycotts in these cases give rise to two types of injury that are suffered by distinct and different classes of potential plaintiffs. The plaintiffs currently before the Court were injured by the product output restrictions and the overcharges that flowed from the violation. The competing, non-defendant primary insurers were injured by the enforcement effects of defendants' cartel. Each class of potential plaintiffs suffered distinct and separable injuries. Indeed, this Court's decisions in both *AGC* and *McCready* expressly recognized the separate standing of different classes of plaintiffs for each of these types of injuries.

No court has ever held that it would be duplicative to allow standing for the victims of violations which also cause actionable injury to defendants' competitors. Such a holding would limit standing to competitors in a wide variety of cases. Such a holding would, for example, deny standing to consumers who pay the overcharges imposed by a monopolist that unlawfully excludes competitors from the market.

Defendants have not offered this Court any principled basis for denying standing to the consumers of cartellized insurance products in this case. Thus, they have not provided any basis for review of the decision of the court of appeals.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

DATED this 14th day of February, 1992

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Supreme Court of the United States

OCTOBER TERM, 1991

HARTFORD FIRE INSURANCE CO., *et al.*,
Petitioners,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

WINTERTHUR REINSURANCE CORP. OF AMERICA,
Petitioner,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE OF THE INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., NATIONAL ASSOCIATION OF CASUALTY & SURETY AGENTS AND NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether domestic insurance companies whose conduct otherwise would be exempt from the federal antitrust laws under the McCarran-Ferguson Act lose that exemption because they participate with foreign reinsurers in the business of insurance.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

Nos. 91-1111 and 91-1131

HARTFORD FIRE INSURANCE CO., *et al.*,
Petitioners,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

WINTERTHUR REINSURANCE CORP. OF AMERICA,
Petitioner,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE OF THE INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., NATIONAL ASSOCIATION OF CASUALTY & SURETY AGENTS AND NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI [1]

Amici curiae Independent Insurance Agents of America, Inc., National Association of Casualty & Surety Agents and National Association of Professional Insurance Agents are non-profit trade associations that represent hundreds of thousands of insurance agents and their employees throughout the United States. Insurance agents serve as the only integrated point of contact in the insurance marketplace—responding to customer needs and representing company interests. On behalf of insurance companies, agents work daily with the insurance forms and insurance policies used by insurance companies. On behalf of their customers, agents observe and respond on a daily basis to the way that insurance policies are understood, compared and utilized. Insurance agents thus have an important interest in promoting policy reform that responds to the needs of their customers and in maintaining a system by which state insurance regulators and their designees can gather the widest possible array of views on the efficacy of insurance practices. Only by hearing the views of companies and consumers can advisory organizations effectively assess the impact of insurance forms on those who underwrite and those who buy insurance. This case is important to these *amici* because the lower court decision threatens the ability of advisory organizations, such as petitioner Insurance Services Office, Inc., to freely gather information for ultimate use by state regulators.

INTRODUCTION AND SUMMARY OF ARGUMENT

Advisory organizations, such as the Insurance Services Office, Inc., ("ISO"), a petitioner in this case, and the National Council on Compensation Insurance ("NCCI"), have historically been enlisted in state efforts to police

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[1] Petitioners and respondents have consented to the filing of this *amicus* brief. Their letters of consent are being lodged with the Clerk.

the insurance industry through their development and recommendation of proposed policy forms: The standardized legal components that, when taken together, compose an insurance contract.[2] That the standardization of policy forms is a valid state goal is not in question. Standardization permits insurance agents and their customers to more easily compare different insurance policies and, therefore, to exercise more informed choice over their purchasing decisions. It establishes certain minimum components, which can be modified or added to by competing insurance companies. Without some kind of standardization, it would be very difficult for insurance agents to compare competing policies and to advise their customers on the differences in coverage and price between different products. In this area, standardization serves to promote—not diminish—consumer choice.

In carrying out their valuable work, advisory organizations have long sought comments on proposed policy forms from a wide body of interested parties in the insurance industry. Through a variety of means, insurance agents and their trade associations provide extensive information to advisory organizations on how policy forms are actually being used—and how new forms would be used—in the marketplace. Insurance agent representatives regularly meet with ISO (i) to improve the coverage aspects of insurance products made available to the public, (ii) to comment upon the impact of proposed forms on insurance agents and (iii) to provide advice and counsel on issues of technical importance.

Through the years, the participation of insurance agents—and of the trade associations that represent them—has assisted the creation of insurance policies responsive to public needs. In the real world, insurance agents act as consumer advocates. Insurance agents pro-

[2] ISO provides policy forms that are used in a wide range of property & casualty insurance coverages. NCCI specializes in workers compensation issues.

moted the idea of packaged personal policies and the Personal Life Combination Policy, which assists consumers in safeguarding their personal assets. At other times, insurance agent representatives have opposed changes in policy forms that would limit consumer choice or impose unreasonable burdens on policyholders. Insurance agents have made their views known on the nature of homeowners' or commercial liability insurance policies by detailing the manner in which specialized versions of such policies are actually used in the marketplace. Similarly, insurance agents have consistently urged greater simplification of forms, so that they can be more easily understood by agents and their customers.

The purpose of such consultation is not obscure. A fully informed process aids advisory organizations, state regulators and, most of all, consumers, who are advantaged by the benefits of successful and informed insurance regulation.

In other words, open dialogue is important to the success of the advisory process—without regard to whether suggestions come from a licensed or un-licensed entity within or beyond state insurance jurisdiction. A good idea is, after all, a good idea without regard to its source.

The marketplace of ideas assumes that the best will be translated into action. But open discussion and acceptance of new proposals can easily lead to charges of "conspiracy": An elastic term of uncertain meaning whose mere appearance on a court pleading can lead to years of expensive and burdensome litigation. It is to avoid just that result that the limited antitrust exemption of the McCarran-Ferguson Act was enacted—so that advisory organizations can fulfill their delegated state function by listening to *all* groups whose views would be of interest to the state regulators themselves—insurers, reinsurers, insurance agents, brokers, buyers, claimants and other regulators.

-This case is important and, for three reasons, this case has been wrongly decided. *First*, the Ninth Cir-

cuit misread *Group Life & Health Ins. v. Royal Drug Co.*, 440 U.S. 205 (1979), which sheds no light on the McCarran-Ferguson issue present here. *Second*, the lower court's interpretation of the antitrust exemption cannot be squared with the purposes for which the statute was enacted. *Third*, the Ninth Circuit failed to comprehend that the effect of its ruling would be to prevent states from using the form of regulatory system that they prefer—a right that is manifestly protected by McCarran-Ferguson.

ARGUMENT

The Ninth Circuit decision imperils the ability of advisory organizations to collect the views of interested parties and to pass them along to state regulators. In relevant part, the McCarran-Ferguson Act provides a limited antitrust exemption for "the business of insurance," to the extent that insurance activities are "regulated by State law. 15 U.S.C. § 1012(b). The lower court ruled that the "state regulation" component could not be met in this case because ISO had consulted with foreign reinsurers who exist, according to the Ninth Circuit, "beyond the jurisdiction of the states." App. at 19a. The Ninth Circuit read this jurisdictional limit as a limit, as well, on the scope of the McCarran-Ferguson exemption. But there are at least three fatal defects in the Ninth Circuit's reasoning.

First, as Petitioner ISO has noted, the Ninth Circuit's analysis misreads the precedent of this Court. In *Group Life & Health Ins. v. Royal Drug Co.*, 440 U.S. 205, 231-32 (1979), the Court held the McCarran-Ferguson antitrust exemption to be inapplicable because an agreement with druggists "involve[d] parties wholly outside the insurance industry" and, therefore, the defendants could not meet the statutory requirement that they be part of the "business of insurance." The Court's conclusion was based on the "analogous" rule that "an

exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." *Id.*

As an initial matter, the Ninth Circuit correctly held that in this case the defendants are in the "business of insurance." Unlike *Royal Drug*, none of the "involved parties [is] wholly outside the insurance industry." *Id.* Nonetheless, the court of appeals used the "analog[y]" mentioned in *Royal Drug* to conclude that the defendants were not "regulated by State law" for the purposes of the McCarran-Ferguson Act because ISO had sought the advice of foreign reinsurers which, the court believed, were "immune" from state regulation. Petition for A Writ of Certiorari, Hartford Fire Insurance Co., et al., App. at 20a.

In so holding, the lower court erroneously wrested *dicta* out of context. The *Royal Drug* case turned on whether defendants were engaged in the business of insurance. The language about exempt entities was only an "analog[y]" useful in deciding that question. Defendants here were engaged in the business of insurance. *Royal Drug* therefore has no further bearing on this case.[3]

Second, the lower court's interpretation of McCarran-Ferguson is flatly inconsistent with the purpose for which that limited antitrust exemption exists. The McCarran-Ferguson exemption is concerned with "the type of state

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[3] In *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 133 (1982), this Court emphasized that the applicable *Royal Drug* analysis focused on defining the "business of insurance"—not on the meaning of the separate "state regulation" requirement—and explained that, even in that context, the presence of parties wholly "outside the insurance industry" does not necessarily extinguish application of McCarran-Ferguson. The possible application of McCarran-Ferguson to parties wholly outside the insurance industry contemplated by the *Pireno* Court cannot, of course, be squared with the lower court's conclusion that the antitrust exemption was lost because of the presence of foreign reinsurers who compose a vital portion of the insurance industry.

regulation that centers around the contract of insurance . . . [including the] relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement . . . ." *Securities & Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 460 (1969).

Permitting advisory organizations freedom to consult with knowledgeable parties fundamentally advances the purpose of state regulation that "centers around the contract of insurance." The purpose of an advisory organization is precisely to provide states with information and views on the content of insurance contracts and to provide standardized contractual provisions responsive to marketplace concerns. The states are free to accept, reject or modify that advice.[4] But there is no question that the consultative process that offers options for state review goes to the heart of the McCarran-Ferguson exemption because it deals directly with the meaning and content of the contract of insurance. Consultation on that question necessarily requires that advisory organizations —like the insurance regulators themselves—seek the views of people who would be affected by the policy forms; people who include reinsurers (asked to supply layers of the coverage) and insurance agents (asked to explain, sell and service the coverage).

The danger caused by the Ninth Circuit interpretation is obvious. Advisory organizations would be effectively barred from consulting with foreign reinsurers. Moreover, advisory organizations might become wary of dealing with other unregulated entities. Insurance agents in

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[4] The uncontested allegations of this case illustrate the consultative process between ISO and state insurance regulators. After ISO proposed standardized Commercial General Liability forms, various insurance departments held continuing discussions with ISO concerning the content of the proposed forms, ISO prepared revisions of the proposed forms, and, finally, states decided whether to approve the forms. Petition for a Writ of Certiorari, Hartford Fire Insurance Co., et al., at 4-6.

one state might not be licensed to sell insurance in another. Insurance agent trade associations might not, themselves, be licensed entities. But both agents and their trade associations—like foreign reinsurers—represent a repository of experience that is invaluable to an advisory organization considering the adoption of policy forms to be considered by a host of states. This case is, therefore, extremely important to the critical role now played by insurance agents and their trade associations in conveying customer concerns to advisory organizations and, through them, to state regulators. The *amici* themselves, as trade associations representing insurance agents, fear that their ability to offer experience and knowledge would be severely chilled were the Ninth Circuit decision left intact.[5] As importantly, the consumer interest in the existence of a fully informed advisory system would be seriously impaired.

The Ninth Circuit seemed to fear that application of the limited antitrust exemption would lead to untoward results. But the opposite is true. The purpose of the McCarran-Ferguson Act is not infringed if ISO may collect views from a person or association that is beyond the scope of state regulation. The purpose of McCarran-Ferguson is, however, infringed if the advisory process is not permited to fully explore the issues that affect a contract of insurance.

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[5] Although the *amici* believe that consultation by an advisory organization with insurance agents or their trade associations would, even under the holding announced by the lower court, fit within the McCarran-Ferguson exemption (because neither agents nor their trade associations are "immune" from state regulation), the existence of the Ninth Circuit decision, with its flawed reasoning and uncertain reach, now threatens litigation (and further error) where no previous threat had existed. Moreover, the broad implications of the opinion below, coupled with the burdens of antitrust litigation and the severe sanctions provided for antitrust violations, create a substantial chilling effect that could seriously inhibit what *amici* believe is desirable and permissible conduct.

Third, the lower court failed to understand that its cramped reading of the "state regulation" requirement was inconsistent with the express language of state insurance regulation itself. A number of states expressly authorize an advisory organization like ISO or NCCI to "[p]repare and file policy forms and endorsements and consult with *members*, *subscribers* and *others* relative to their use and application." Ark. Stat. Ann. § 23-67-116; Haw. Rev. Stat. § 431:14-107.1; Me. Rev. Stat. Ann., tit. 24-A § 2321-D; Miss. Code Ann. § 83-2-15; *see also* Ken. Rev. Stat. Ann. § 304.13-121 (permitting advisory organizations to consult with "members and others" on use of policy forms); Wyo. Stat. § 26-14-109 (also permitting advisory organization to consult with "members, subscribers and others" on policy forms). The meaning of the statutory reference to "others" is plain: Advisory organizations are permitted to consult with any interested party, like the *amici* here, in order to provide the state insurance regulators with the best possible advice.[6]

These laws simply track common sense. The task given to advisory organizations—to advise on matters of insurance policy—cannot be performed without consultation with those who will supply, sell or be protected by insurance contracts. Consultation cannot be effective unless advisory organizations are permited to seek the views of those with experience and knowledge. Indeed, the better an advisory organization performs its task, the easier will be the job of insurance regulators when they are called upon to decide which policy forms should be used.

The lower court's error was to confuse regulatory reach with regulatory invitation. It may be, as the Ninth Circuit concluded, that certain reinsurers are beyond the scope of a state's insurance regulation and thus could not,

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[6] The State of Colorado has gone even further by establishing a statutory right by which any aggrieved party may file a complaint with an advisory organization requesting the organization "to review the manner in which the [policy form] has been applied with respect to insurance afforded him." Colo. Rev. Stat. § 10-4-418.

for example, be subject to state sanction. But that is not the issue here. Here the state has, through the use of an advisory organization, invited reinsurers to provide their views. That invitation constitutes "state regulation" for the purposes of the McCarran-Ferguson Act. As the district court correctly noted, "[t]he condition of state regulation is satisfied by 'a state regulatory scheme possess-[ing] jurisdiction over the challenged practice.'" App. at 47a (quoting *Feinstein v. Nettleship Co.*, 714 F.2d 928, 933 (9th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984)). Because each state has jurisdiction over the challenged practice—the manner in which an advisory organization formulates advisory policy forms—the "state regulation" requirement is fully satisfied.

Yet the effect of the lower court opinion would be to eviscerate the ability of an advisory organization to collect the informed views of all interested parties. It would necessarily result in the provision of imperfect information. Such a dramatic change in settled practice and law—inconsistent with past Supreme Court precedent—requires the plenary consideration of this Court.

CONCLUSION

The petitions for certiorari should be granted.

Respectfully submitted,

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No. 91-1131

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IN THE

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OCTOBER TERM, 1991

WINTERTHUR REINSURANCE CORP. OF AMERICA,
Petitioner,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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IN THE

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No. 91-1131

WINTERTHUR REINSURANCE CORP. OF AMERICA,
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REPLY BRIEF FOR PETITIONER

Petitioner Winterthur Reinsurance Corp. of America hereby submits this reply brief in support of its petition for a writ of certiorari.

ARGUMENT

1. *The Doctrine of Antitrust Standing Is Still Plagued by Confusion.* Perhaps more illuminating than any argument advanced by the respondents in their consolidated brief is their statement that "[a]s to the claims for damages, each petition advocates a different formulation of [the antitrust standing] test." Resp. Br. 27-28. This is hardly surprising. In the nine years since this Court set forth the new test for antitrust standing in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), the lower courts have failed to come to any consensus on

how to apply that test. Respondents do not contest this fact. Respondents do not suggest that there is any uniformity among lower courts as to whether all the *Associated General Contractors* factors must be met by a plaintiff, or as to what weight should be accorded each of these factors.

Instead, respondents suggest that this Court should ignore the analytical inconsistencies that have arisen in lower court applications of *Associated General Contractors*. Respondents ask this Court to deny Winterthur's petition on the grounds that the court of appeals held "that plaintiffs satisfy each [*Associated General Contractors*] factor for all claims." Resp. Br. 28. Yet the court of appeals did no such thing. The court affirmed the grant of standing because "[a]lmost all of the *Associated General Contractors* factors point to the presence of standing. . . ." Winterthur App. 16a. In short, the question left unanswered by *Associated General Contractors* is of critical importance to this case. If *all* of the *Associated General Contractors* factors must be met for a plaintiff to have standing, then the court of appeals failed to apply the *Associated General Contractors* test for standing correctly.

2. *Respondents' Alleged Injury Was Indirect.* Tellingly, respondents now acknowledge that "the initial victims of the boycott are non-defendant primary insurers. . . ." Resp. Br. 27. In view of this concession, the court of appeals' summary conclusion that respondents suffered a "direct injury" caused by the reinsurers' alleged boycott of primary insurers is simply untenable. Indeed, as the court of appeals itself recognized, "the action of the reinsurers took effect through the primary insurers." Winterthur App. 15a. The vitality of *Associated General Contractors* will be severely sapped if lower courts can close their eyes to undisputed facts and nevertheless label indirect injuries as "direct."

Nor can the court of appeals' holding fairly be characterized as "consistent with the Court's prior decision in *McCready*," as respondents contend. Resp. Br. 27. In *Blue Shield of Va.* v. *McCready*, 457 U.S. 465 (1982), the antitrust plaintiff, McCready, was clearly the *direct* victim of the alleged conspiracy between Blue Shield and the defendant association—*i.e.*, Blue Shield refused to reimburse McCready for expenses *she* incurred when she received treatment from her psychologist. As this Court explained:

> "McCready has paid her psychologist's bills; her injury consists of Blue Shield's failure to pay her. Her psychologist can link no claim of injury to himself arising from his treatment of McCready; he has been fully paid for his service and has not been injured by Blue Shield's refusal to reimburse her for the cost of his services." *Id.* at 475.

Thus, the injury suffered by the plaintiff in *McCready* was without question a direct injury. Yet in this case, as respondents admit, it is the primary insurers—not the respondents—who are the direct victims of the reinsurers' alleged refusal to sell reinsurance. Resp. Br. 27. Thus, contrary to respondents' argument, their alleged injuries are comparable to the indirect injury of the Union which was denied standing in *Associated General Contractors*. Just as the Union's injury was allegedly caused by the defendants' conspiracy to boycott unionized contractors, the respondents' injuries here were allegedly caused by the reinsurers' conspiracy to deny reinsurance to primary insurers. Similarly, just as the Union in *Associated General Contractors* could not gain standing by alleging that defendants "intended" to injure it (459 U.S. at 545), respondents here cannot gain standing by alleging that reinsurers "intended" to injure them.

3. *Artful Pleading Cannot Be The Basis For Granting Standing.* Despite the fact that respondents never purchased or attempted to purchase reinsurance, they now

contend that they have standing to sue reinsurers because their "complaints plainly allege . . . that the reinsurers' boycotts restrained the *primary insurance* market in which the plaintiffs are consumers." Resp. Br. 25 (emphasis in original). Yet a skillful allegation that an antitrust violation in one market (*e.g.*, reinsurance) has repercussions in another market (*e.g.*, primary insurance) cannot magically convert the plaintiff into a "consumer" in a market where he does not purchase. Try as they might, respondents cannot fairly claim to be "consumers" of reinsurance, and they should not be able to sue defendants who allegedly engaged in a concerted refusal to sell reinsurance.

4. *The "Global Conspiracy" Smokescreen Should Not Obscure The Important Standing Issues.* In an apparent effort to deflect this Court's attention from the inconsistent application of *Associated General Contractors* in the lower courts, respondents argue that they are entitled to sue the reinsurers because they have alleged that "the reinsurers are coconspirators of the defendant primary insurers." Resp. Br. 28-29. Respondents theorize that this so-called "global conspiracy claim" means that "[a]ny issues of duplicative liability and allocation can be resolved because all potentially conflicting claimants are joined in the litigation." *Id.* at 29. This is simply wrong.

Even with this co-conspiracy allegation, the reinsurers' alleged restraint is still a restraint in a separate market—the reinsurance market—where respondents are *not* consumers. Respondents' alleged injury is still *indirect;* no respondent purchased or sought to purchase reinsurance from any reinsurer. The allegation that the defendant primary insurers induced the reinsurer conspiracy does not change these facts.

Perhaps most importantly, more than ninety-nine percent of the primary insurers in this country are *not* defendants in this litigation. These non-parties are the

direct victims of the reinsurers' alleged restraint, as respondents now concede. *Id.* at 27. The claims made by respondents who purchased (or were denied) insurance from these non-party primary insurers raise the problems of "duplicative liability and allocation" that antitrust standing limitations are designed to eliminate. *See* 459 U.S. at 543-44. It defies explanation how respondents can assert to this Court that "all potentially conflicting claimants are joined in the litigation." Resp. Br. 29.[1]

5. *Important Issues of Standing Remain Unresolved.* If the court of appeals' decision is not reviewed by this Court, then the goal of achieving uniformity among the lower courts will remain unfulfilled. Lower courts will remain free to sidestep the antitrust standing limitations set down in *Associated General Contractors* simply by characterizing indirect injuries as "direct," and by characterizing plaintiffs as "consumers" without regard to the market in which they purchase. The antitrust standing limitations set down in *Associated General Contractors*—and the policies that underlie these limitations —are too important to be vitiated in this manner.

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[1] Respondents' attempt to compare this case to a suit by consumers against a monopolist is unfounded. See Resp. Br. 30. Consumers who purchase directly from a monopolist at anticompetitive prices are *direct* victims, who can file suit. Competitors of a monopolist who are unlawfully driven out of business are also *direct* victims, who can file suit. Here, in contrast, respondents are neither competitors of reinsurers nor direct purchasers from reinsurers.

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CONCLUSION

For the foregoing reasons, petitioner Winterthur respectfully submits that its petition for a writ of certiorari should be granted.

Respectfully submitted,

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Nos. 91-1111, 91-1128, 91-1131, and 91-1146

In the Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., ET AL.; MERRETT UNDERWRITING AGENCY MANAGEMENT LTD., ET AL.; WINTERTHUR REINSURANCE CORP. OF AMERICA; AND UNIONAMERICA INSURANCE COMPANY LTD., ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether domestic insurance companies forfeited their antitrust immunity under the McCarran-Ferguson Act by allegedly conspiring with foreign reinsurers that are not subject to regulation by the States.

2. Whether petitioners' alleged activities constituted a boycott for purposes of the McCarran-Ferguson Act, 15 U.S.C. 1011-1015.

3. Whether petitioners' alleged activities are exempt from the antitrust laws under the state action doctrine.

4. Whether respondents have antitrust standing.

5. Whether principles of comity require the dismissal of certain claims against the foreign reinsurers.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

Nos. 91-1111, 91-1128, 91-1131, and 91-1146

HARTFORD FIRE INSURANCE CO., ET AL.; MERRETT UNDERWRITING AGENCY MANAGEMENT LTD., ET AL.; WINTERTHUR REINSURANCE CORP. OF AMERICA; AND UNIONAMERICA INSURANCE COMPANY LTD., ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Respondents—19 States and numerous private parties—brought these consolidated actions against several primary insurers, reinsurers, insurance underwriters and brokers, and two insurance associations. Respondents allege that petitioners violated the federal antitrust laws, as well as state laws, by engaging in a conspiracy to coerce other insurance companies to alter the terms on which they sell insurance.

1. a. Commercial general liability (CGL) insurance protects the insured against the risk of liability to third parties for personal injuries or property damage. "Pri-

mary" insurers (including petitioners Hartford Fire Insuance Co., Allstate Insurance Co., Aetna Casualty and Surety Co., and CIGNA Corporation) sell CGL insurance to businesses, nonprofit organizations, and government entities. Pet. App. A13.[1]

"Reinsurers" sell insurance to insurers. ("Retrocessional" insurance is insurance for reinsurers. Pet. App. A13.) Primary insurers purchase reinsurance through a network of specialized insurance brokers and underwriters, many of whom do business through Lloyd's of London. The reinsurers' participation in CGL insurance protects the primary insurance companies against catastrophic losses. In addition, primary insurers that "cede" some of the risks they underwrite to reinsurers are freed from the obligation to maintain large reserves against those risks, and thus are able to sell more insurance. Petitioners include domestic reinsurers, such as General Reinsurance Corp. and Winterthur Reinsurance Corp. of America; foreign reinsurers, including six reinsurers known collectively as the "London Company Market" corporations; and several insurance brokers. Pet. App. A13-A14, A116.

Defendant Insurance Services Office (ISO) is an association of more than 1,400 property and casualty insurers that develops standard forms of insurance policies, collects data, and estimates insurance risks. ISO also presents the standard forms to state insurance officials for approval. CGL insurance is written primarily on standard forms developed by ISO. Defendant Reinsurance Association of America is primarily a lobbying organization. Pet. App. A14.

b. For many years, primary insurers sold CGL insurance primarily on an "occurrence" basis. An "occurrence" policy protects the insured against occurrences of liability during the life of the policy, regardless of when a claim is filed. Occurrence insurance has a "long tail"—*i.e.*,

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[1] Unless otherwise noted, "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari in No. 91-1146 (the Unionamerica Petition).

claims may be filed against the insurance company long after the policy has expired. Pet. App. A14.

Respondents allege that the defendant primary insurers undertook a campaign to end sales of CGL insurance on an occurrence basis, and to substitute "claims-made" insurance. A "claims-made" policy, as its name suggests, provides protection only against claims that are made during the life of the policy. In addition to substituting "claims-made" CGL insurance for "occurrence" insurance, respondents allege that the defendant primary insurers sought to (1) include in claims-made policies a "retroactive date" provision that cuts off coverage for occurrences prior to the retroactive date, even if a claim is filed during the life of the policy, (2) exclude from CGL coverage "sudden and accidental" pollution coverage, and (3) limit coverage of legal defense costs. Pet. App. A14, A121-A122.

Respondents allege that other primary insurers and ISO did not agree to these changes. Instead, in 1984 ISO issued standard CGL policy forms for both occurrence and claims-made insurance. ISO's claims-made policy did not include a retroactive date provision. In addition, both types of ISO policies covered sudden and accidental pollution damages and legal defense costs. Pet. App. A122.

Respondents allege that the defendant primary insurers, unsatisfied with this state of affairs, took steps to coerce recalcitrant competitors to accept the proposed restrictions on CGL coverage. To achieve their goal, the defendant primary insurers allegedly enlisted the assistance of domestic and foreign reinsurers. The conspirators allegedly agreed that the reinsurers would refuse to reinsure any CGL risks on the disputed ISO forms until ISO (1) eliminated the CGL occurrence form, (2) excluded pollution liability coverage from its CGL forms, (3) added a retroactive date to the claims-made form, and (4) limited coverage of defense costs. Pet. App. A15, A123-A127.

Respondents allege that petitioners' scheme was successful. ISO withdrew the 1984 forms and replaced them with forms that excluded pollution coverage and included

a retroactive date provision. Under continuing pressure from the London reinsurers, ISO later withdrew statistical and actuarial support for CGL occurrence forms. Without ISO's support, respondents allege, primary insurers were no longer able to write occurrence insurance. Pet. App. A15, A126-A133.

In 1985, petitioners successfully urged ISO to develop standardized forms of "excess" and "umbrella" insurance that contained a retroactive date, a pollution exclusion, and limits on defense costs. The effect of these modifications was to ensure that consumers could not obtain the disputed types of insurance coverage by purchasing excess or umbrella insurance. Pet. App. A131-A132, A144-A145.

2. The district court dismissed the complaints. Pet. App. A36-A86. It concluded that the challenged conduct was part of the "business of insurance," and therefore immune from the federal antitrust laws under the McCarran-Ferguson Act, 15 U.S.C. 1011-1015. Pet. App. A47-A49. The court held that petitioners' alleged conduct was not within the "boycott" exception to the McCarran-Ferguson immunity, because respondents had not alleged a refusal to deal on any terms or "conduct which goes beyond the making and implementation of agreements to do business only on terms acceptable to the participant." *Id.* at A58.

The district court also held that petitioners were immune under the state action doctrine to the extent that respondents' allegations concern activities related to the development of standard CGL forms. The court found that the States had authorized collective development of insurance forms and had approved the more restrictive CGL forms favored by petitioners. Pet. App. A59-A63.

The court rejected petitioners' contentions that respondents lacked antitrust standing, and that respondents had not alleged a sufficiently direct impact on United States commerce to satisfy the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a. Pet. App. A65-A67, A73-A82. Relying on principles of international comity set forth in *Timberlane Lumber Co.* v.

Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976), however, the court dismissed three claims directed solely at the London reinsurers (Counts 5, 6, and 8 of the California complaint). The court concluded that application of the federal antitrust laws to those claims would lead to a significant conflict with English law and policy. Pet. App. A69-A82.

Because the district court dismissed all the federal claims, it also dismissed the pendent state law claims. Pet. App. A83.

3. The court of appeals reversed. Pet. App. A1-A35. The court held that petitioners had not demonstrated that they were entitled to immunity under the McCarran-Ferguson Act for two independent reasons. First, because the States have no power to regulate reinsurance contracts entered into in foreign nations, the court concluded that unregulated activities with which the defendants were charged fall outside the scope of the McCarran-Ferguson Act. Pet. App. A22-A24. The court further concluded that the domestic defendants forfeited their McCarran-Ferguson immunity "when they conspired with the foreign defendants." *Id.* at A24.

Second, the court held that petitioners' alleged conduct is within the boycott exception to McCarran-Ferguson immunity. The court emphasized respondents' allegations that the insurers "enlisted the reinsurers to compel capitulation by ISO and the insurers who had refused to go along with the Hartford demands." Pet. App. A26. This, the court held, alleges a McCarran-Ferguson Act boycott. The court rejected the district court's suggestion that the boycott exception applies only to an absolute refusal to deal on any terms. It explained that "[t]he evil of a boycott is not its absolute character but the use of the economic power of a third party to force the boycott victim to agree to the boycott beneficiary's terms." *Id.* at A27.

The court of appeals also reversed the district court's state action ruling. Pet. App. A29-A30. The court explained that the anticompetitive conduct at issue is the alleged boycott, and there is no evidence that any State

authorized or actively supervised the boycott. The court held that the States' approval of the ISO forms was not sufficient to confer state action immunity on the boycott, because "state approval of one activity is not state approval of a related but distinct activity." *Id.* at A29.

The court of appeals agreed with the district court that respondents have antitrust standing against all petitioners and that the FTAIA does not bar any of respondents' claims. Pet. App. A19-A21, A30-A31. But the court of appeals, unlike the district court, concluded that comity was not a bar to respondents' claims against the London reinsurers. *Id.* at A30-A35. In applying the balancing analysis of its *Timberlane* decision, the court of appeals concluded that "[a] single factor points toward abstention: the conflict with a long-established British policy towards * * * the underwriting of insurance." *Id.* at A35. But the court concluded that "[e]very other factor —nationality, likelihood of compliance, the significance of the effects on American commerce, their foreseeability and their purposefulness—points to the appropriateness of exercising jurisdiction." *Ibid.*

DISCUSSION

This is a complex and important case. The parties include 19 States and several major domestic and foreign insurance companies. Petitioners state (H. Pet. 11) that the court of appeals' ruling "is of enormous importance and has disrupted the most basic operations of the insurance industry." Moreover, state officials have publicly recognized the significance both of the litigation generally and of the court of appeals' decision specifically.[2] The court's interlocutory decision does not, however, conflict with any decision of this Court or any other court of appeals. Although we are troubled by the court's

[2] See H. Pet. 10-11 (quoting state officials' comments). See also N.Y. State Bar Ass'n, Antitrust Law Sec. Symposium 109 (Jan. 28, 1992) (remarks of George Sampson, Chief of Antitrust Enforcement, State of New York) ("[I]t is incumbent upon the industry to examine many of the activities that currently go on in the industry and take a very careful look.").

suggestion that a domestic insurance company loses its antitrust immunity under the McCarran-Ferguson Act merely because it acts in concert with foreign reinsurers, that suggestion was part of an alternative holding that did not alter the result. Accordingly, we do not believe that review by this Court is warranted at this time.[3]

1. The McCarran-Ferguson Act exempts petitioners' activities from the federal antitrust laws to the extent that they are part of "the business of insurance," are "regulated by State Law," and are not "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 15 U.S.C. 1012(b), 1013(b). The petitioners in No. 91-1111 (the Hartford petitioners) contend (H. Pet. 14-18) that the court of appeals erred in holding that they are not entitled to antitrust immunity under the McCarran-Ferguson Act because they allegedly conspired with foreign reinsurers that are not generally subject to regulation by the States.[4]

We disagree with the court of appeals' suggestion that domestic insurers whose activities would otherwise be immune under the McCarran-Ferguson Act automatically forfeit that immunity merely because they participate in those activities with foreign reinsurers that are generally not subject to state regulation.[5] As the Hartford peti-

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[3] Although we believe that the court of appeals reached the correct result, we intend no criticism of the district court's efforts to require the parties to focus their contentions and resolve as many legal and factual issues as possible without trial. Indeed, the government strongly endorses judicial management techniques of the sort that we understand were employed in this case to streamline antitrust litigation. Moreover, we do not view the court of appeals' decision as precluding the possibility that the case can be resolved on remand on motion for summary judgment.

[4] The petitioner in No. 91-1131, Winterthur Reinsurance Corp., raises each of the questions presented by the Hartford petitioners, and incorporates by reference the Hartford petitioners' arguments. W. Pet. 24.

[5] As the court of appeals observed (Pet. App. A22-A23), this Court has held that a State may not regulate reinsurers where no act in the course of formation, performance, or discharge of the reinsurance contract takes place within the State. See *Connecticut*

tioners correctly note (H. Pet. 15), McCarran-Ferguson immunity applies to "the business of insurance to the extent that such business is * * * regulated by State Law." 15 U.S.C. 1012(b). The statutory language focuses not on the nature of the "entity" at issue, but on the nature of the activity at issue—whether it is "the business of insurance"—and whether that activity is regulated by state law. Consequently, contrary to the court of appeals' conclusion, the mere fact that an "exempt entity" (*i.e.*, a domestic insurance company) acts in concert with a "nonexempt entit[y]" such as a foreign reinsurer does not automatically cause the exempt entity to "forfeit[] [its] antitrust exemption." Pet. App. A24.[6]

Despite our disagreement with the court of appeals' analysis in this respect, we do not believe that the court's ruling warrants interlocutory review. For reasons discussed below, we believe that the court of appeals correctly held that respondents have alleged conduct within the boycott exception to antitrust immunity under McCarran-Ferguson. The court's boycott ruling was "an 'independent ground' of decision" for denying McCarran-Ferguson immunity (H. Pet. 9); consequently, reversing the "forfeiture" ruling would not alter the court of appeals' decision. See *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297-298 (1956) ("This Court * * * reviews judgments, not statements in opinions."); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S.

General Life Ins. Co. v. *Johnson*, 303 U.S. 77, 81 (1938). The legislative history of McCarran-Ferguson indicates that Congress understood and accepted that limitation on state regulatory authority. See 91 Cong. Rec. 1442 (1945) (statement of Sen. McCarran).

[6] It is true, as petitioners recognize (H. Pet. 16), that one of the factors that is relevant to determining whether a particular practice is part of the "business of insurance" is whether the practice is "limited to entities within the insurance industry." *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 129 (1982). But respondents do not dispute that reinsurers are entities within the insurance industry, and we agree that reinsurance is "a very essential phase" of the business of insurance. 90 Cong. Rec. 6528 (1944) (statement of Rep. Miller).

837, 842 (1984).[7] In addition, unless the particular activities at issue were "regulated by State Law," they would fail for that reason to qualify for McCarran-Ferguson immunity. 15 U.S.C. 1012(b).

We recognize that primary insurers in the United States traditionally have had close ties with foreign reinsurers. Accordingly, petitioners are concerned about the implications of the court of appeals' reasoning for their day-to-day business activities. This is a legitimate and justifiable concern, but we are not persuaded that the Ninth Circuit's brief and singularly unilluminating discussion of the forfeiture issue warrants interlocutory review. In our view, primary insurers may indeed engage in joint activities with foreign reinsurers without forfeiting McCarran-Ferguson immunity to the extent that (1) the primary insurers are engaged in the business of insurance, and (2) their activities are regulated by the States. The second requirement depends, of course, on the law of each individual State. As to the first requirement, we fully agree with petitioners (and respondents do not appear to disagree) that reinsurance is part of the business of insurance, and that consequently discussions and agreements between primary insurers and reinsurers concerning the terms and conditions of insurance or reinsurance will generally fall within "the business of insurance."

2. a. The Hartford petitioners also contend (H. Pet. 18-25) that the court of appeals erred in ruling that their alleged activities constituted a boycott within the meaning of the McCarran-Ferguson Act. We are unpersuaded.

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[7] The court of appeals concluded (Pet. App. A28-A29) that respondents have not alleged a boycott directed at excess and umbrella insurance. In our view, respondents' complaint may fairly be read as alleging that petitioners' alleged activities in the excess and umbrella market were in aid of the CGL boycott. In any event, the petitioners who deal in excess and umbrella insurance also deal in CGL insurance. Consequently, interlocutory review of the "forfeiture" issue would result, at most, in dismissal of some relatively minor claims against some petitioners.

Notwithstanding petitioners' assertion (H. Pet. 24), the court of appeals did not find "a boycott based on nothing more than collective agreements among insurers and reinsurers as to the coverage risks they would be willing to accept." To the contrary, the court of appeals expressly recognized that McCarran-Ferguson allowed the defendants to "confer and agree on the terms on which insurance would be offered; the immunity in so doing is incontestable." Pet. App. A25. The court concluded, however, that petitioners "are charged with much more." *Ibid.* In particular, the court explained, respondents allege that the primary insurers "enlisted the reinsurers to compel capitulation by ISO and the insurers who had refused to go along with the Hartford demands. * * * [T]he defendants have gone beyond joint action to their own regulation of the terms on which CGL and property insurance will be offered." *Id.* at A26-A27.[8]

In our view, the conduct alleged in the complaint falls within the exception to McCarran-Ferguson immunity for "any * * * act of boycott, coercion, or intimidation."[9] 15 U.S.C. 1013(b). Petitioners correctly note (H. Pet. 18) that this Court has decided only one case concerning the scope of the so-called boycott exception to McCarran-Ferguson. In *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531 (1978), the four medical malpractice insurers in Rhode Island agreed that the three competitors of St. Paul would not sell insurance to St. Paul's cus-

[8] Petitioners contend (H. Pet. 24) that the court of appeals misread the complaints, and that "in each instance" respondents' allegations "amount[] to no more than an agreement as to the insurability of risks and the terms and conditions of insurance coverage." Fairly read, however, respondents' complaints adequately allege that petitioners enlisted reinsurers to compel dissenting primary insurers to go along with petitioners' demands—that is, they engaged in private regulation of the terms on which CGL insurance would be offered. In any event, interlocutory review of that fact-bound determination is not warranted.

[9] The word "boycott" derives from the treatment accorded to Charles C. Boycott, an English land agent in Ireland who was ostracized in 1880 for refusing to reduce rents. See *Webster's Third New International Dictionary* 264 (1986).

tomers. The *Barry* boycott was thus unusual because it was aimed directly at consumers rather than at competitors. The Court nevertheless concluded in *Barry* that the boycott provision was also intended to reach efforts by insurance companies to coerce unwilling competitors to adopt particular rules or practices. See 438 U.S. at 541, 549 ("boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target," and includes "regulation by private combinations [or] groups"). The dissenters in *Barry* agreed with the Court on this point. See *id.* at 565 (Stewart, J., dissenting) (boycott exception applies to "attempts by members of the insurance business to force other members to follow the industry's private rules and practices").

The *Barry* Court recognized that a clear example of a boycott was the activity at issue in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). See *Barry*, 438 U.S. at 546-550. *South-Eastern Underwriters* involved, among other things, conduct similar to that alleged here: a group of primary insurers conspired with reinsurers to deny reinsurance to competing primary insurers until they agreed to the conspirators' terms. See 322 U.S. at 535 ("The conspirators * * * employed boycotts together with other types of coercion and intimidation to force non-member insurance companies into the conspiracies * * *. *Companies not members of S.E.U.A. were cut off from the opportunity to reinsure their risks.*") (emphasis added).

The legislative history of the McCarran-Ferguson Act reinforces the conclusion that the activities alleged here fall within the boycott exception. Senator O'Mahoney, one of the Senate conferees and a floor manager of the legislation (91 Cong. Rec. 1208 (1945)), put the matter succinctly: "[A]ny attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in

a way that was disapproved by them would be absolutely prohibited by this provision." *Id.* at 1480. See also *id.* at 1483 (statement of Sen. O'Mahoney) (Sherman Act will continue to prevent private groups from "regulat[ing] in the field of interstate commerce").

b. We disagree with the Hartford petitioners' suggestion (H. Pet. 21-24) that the boycott exception applies only to an "absolute refusal to deal upon any terms." H. Pet. 21. It is true that in *Barry* the Court noted that four medical malpractice insurers were "alleged to have agreed that three of the four would not deal on any terms with the policyholders of the fourth." 438 U.S. at 552. But the Court made that comment in the course of its analysis of the unusual boycott at issue in *Barry*, which was directed at consumers rather than competitors. Indeed, the Court began its discussion by holding that "the term 'boycott' is not limited to concerted activity against insurance companies," and then proceeded to consider whether "the type of private conduct alleged to have taken place in this case, *directed against policyholders*, constitutes a 'boycott.'" *Ibid.* (emphasis added). In addition, the *Barry* Court concluded that Congress intended the term "boycott" in McCarran-Ferguson to be interpreted in light of the definition of that term under the Sherman Act. 438 U.S. at 541. A boycott under the Sherman Act may include a conditional concerted refusal to deal. See *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209, 213 (1959) (some boycotting manufacturers and distributors continued to deal with the target, although not on the same terms as with the target's competitor, who was a part of the conspiracy).

Moreover, McCarran-Ferguson refers not only to boycotts, but also to "any * * * act of * * * coercion or intimidation." The ordinary meaning of "coercion" and "intimidation" is broad enough to encompass efforts to compel the target of the boycott to deal on specified terms. Indeed, those terms connote the use of power to compel the victim to do something—*i.e.*, a conditional refusal to deal. By contrast, if the boycott exception were limited

to absolute refusals to deal, the McCarran-Ferguson Act would immunize virtually any form of coercive activity, as long as the companies engaging in coercive tactics did not seek to drive their competitors completely out of business by refusing to deal with them on any terms. We therefore agree with the court of appeals that petitioners' alleged conduct is within the boycott exception of McCarran-Ferguson.[10]

Petitioners emphasize (H. Pet. 18 n.18) "the uncertain state of the boycott exception." See also *id.* at 22 (asserting that courts and commentators are badly confused over whether boycotts are limited to absolute refusals to deal). We agree that *Barry* did not resolve all questions in this area, and that it is by no means always self-evident whether a particular set of facts constitutes a "boycott." See *Barry*, 438 U.S. at 543 ("boycotts are not a unitary phenomenon") (quoting P. Areeda, *Antitrust Analysis* 381 (2d ed. 1974)). But, while uncertainties remain in this area of law, *Barry* did establish some basic lines of demarcation. As the court of appeals recognized (Pet. App. A25), an agreement among insurers "on the terms on which insurance would be offered," without more, is not a McCarran-Ferguson boycott. Moreover, such an agreement does not become a non-immune boycott merely because it has some effect on other insurers. But an otherwise lawful agreement becomes a non-immune boycott if it has the purpose and effect of "pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target," and amounts to "regulation by private combinations [or] groups." *Barry*, 438 U.S. at 541, 549. As leading commentators have recognized, "'a [concerted] refusal to

[10] The legislative history provides further evidence that Congress intended to outlaw efforts of private groups to impose their preferences on their competitors, without limitation as to the particular form such private regulation takes. See, *e.g.*, 91 Cong. Rec. 1480, 1483, 1485 (1945). Indeed, the conduct at issue in *South-Eastern Underwriters*, which petitioners themselves regard as the paradigm of a boycott outlawed by McCarran-Ferguson (H. Pet. 22), involved a conditional refusal to deal. 322 U.S. at 535, 562.

deal except [on specified terms], without more' is exempt." but such a refusal becomes "a nonexempt boycott as soon as the cartel members attempt[] to coerce recalcitrant members." P. Areeda & H. Hovenkamp, *Antitrust Law* 123 (Supp. 1991) (quoting *In re Workers' Comp. Ins. Antitrust Litig.*, 867 F.2d 1552, 1561 (8th Cir. 1989)).[11]

c. Petitioners' alleged conduct may pass muster under the antitrust laws even if it is not immune under

[11] Although petitioners assert that there is "pervasive disarray" in the lower courts over whether the boycott exception includes conditional refusals to deal, petitioners cite only two court of appeals decisions. Upon careful analysis, those decisions are not, we believe, in conflict. In *Virginia Academy of Clinical Psychologists* v. *Blue Shield*, 624 F.2d 476, 484 (4th Cir. 1980), cert. denied, 450 U.S. 916 (1981), the court stated that an allegation of boycott "does [not] necessarily fail because the concerted refusal to deal is conditional, rather than absolute." In *In re Workers Comp. Ins. Antitrust Litig.*, 867 F.2d 1552 (8th Cir. 1989), the court held that an agreement to expel recalcitrant insurers from a rating bureau was a McCarran-Ferguson boycott. There was no "absolute refusal to deal" in the *Workers Compensation* case because insurers were permitted to retain their membership in the rating bureau as long as they adhered to fixed rates and other conditions set by the conspiring insurers. The ABA report quoted by the petitioners (H. Pet. 22) cites not one case to support its assertion that "[m]ost cases require a refusal to deal on any terms." American Bar Ass'n, *Report of the Commission to Improve the Liability Insurance System* 54 n.10 (1989).

The confusion that petitioners discern arises because "[l]ogically speaking, a simple agreement among insurance companies to charge certain premium rates could be viewed as a boycott agreement, since its observance would result in a collective refusal to deal with policyholders except at a fixed price." *Proctor* v. *State Farm Mut. Auto. Ins. Co.*, 561 F.2d 262, 274 (D.C. Cir. 1977), vacated, 440 U.S. 942 (1979). For example, the quoted statement in the ABA report occurs in a footnote to the statement that "cooperative efforts to standardize policy forms have been thought to be included well within the McCarran-Ferguson exemption." *ABA Report* at 54. Although petitioners are correct that the boycott exception does not include every agreement that could be viewed as a conditional refusal to deal, it does not follow that *no* conditional refusal to deal is a McCarran-Ferguson boycott. See *Proctor*, 561 F.2d at 276 n.23 (rejecting suggestion "that a total refusal to deal is necessary").

McCarran-Ferguson. "It is axiomatic that conduct which is not exempt from the antitrust laws may nevertheless be perfectly legal." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 210 n.5 (1979). In particular, the Court has noted that "boycotts are not a unitary phenomenon," *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. at 543, and has carefully distinguished the breadth of the boycott exception to McCarran-Ferguson from the question "whether the conduct in question * * * is *per se* unreasonable." *Id.* at 542. The Court has firmly insisted that the latter category of group boycotts "is not to be expanded indiscriminately" and has generally limited application of the per se rule to "cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." See *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986). See also *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 293-295 (1985) (detailing characteristics relevant to determining whether a concerted refusal to deal merits per se treatment). "[W]here the economic impact of certain practices is not immediately obvious," the Court has applied the rule of reason rather than a per se analysis. *Indiana Fed'n of Dentists*, 476 U.S. at 458-459 (citing *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979)).

In this case, the complaints allege a concerted refusal to deal by reinsurers at the behest of a group of primary insurers. In our view, that is a claim within the exception to the McCarran-Ferguson Act for "boycott, coercion, or intimidation." There is thus no antitrust exemption for the alleged conduct, and the question whether petitioners' alleged conduct was lawful therefore must be analyzed under the antitrust laws. Although we express no view on the merits and have no firm basis for doing

so,[12] we note that further development of the facts may reveal that petitioners' alleged activities are subject to analysis under the rule of reason rather than the per se rule. For example, the decisions of this Court do not necessarily require per se condemnation if the challenged agreement called for the reinsurers to deal with all primary insurers on equal terms. The defendants would have an opportunity to make "plausible arguments that [the challenged practices] * * * were intended to enhance overall efficiency and make markets more competitive." *Northwest Stationers*, 472 U.S. at 294. In that case, per se condemnation would be warranted only if it can be shown that the restriction's "likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote." *Ibid.*

3. The Hartford petitioners contend (H. Pet. 26-30) that their alleged activities are exempt from the federal antitrust laws under the state action doctrine, because several States approved the revised ISO standard forms. That contention does not merit review.

The court of appeals applied the correct legal standard: in order for private anticompetitive conduct to be exempt from the antitrust laws under the state action doctrine, the activity must take place pursuant to clearly articulated state policy, and must be actively supervised by the State. Pet. App. A29. See *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). In addition, the court of appeals did not disagree with petitioners' contention that the States authorized and actively supervised the collective develop-

[12] In 1987, the Antitrust Division concluded that the primary cause of the crisis in property-casualty insurance was "unanticipated changes in the manner in which tort liability has been established and damages assessed." Antitrust Div., Dep't of Justice, *The Crisis in Property-Casualty Insurance, in* Tort Policy Working Group, *An Update on the Liability Crisis* App. 1 (1987). We are not aware of any reason to alter that conclusion. At the same time, our general assessment of the central cause of the insurance crisis does not, of course, rule out the possibility of specific instances of collusion.

ment of insurance forms, and that consequently that activity is shielded by the state action doctrine. Pet. App. A29.

The court of appeals concluded, however, that the activity challenged by respondents was separate conduct not authorized or supervised by the States: namely, a reinsurance boycott to coerce dissenting primary insurers to accept more restrictive terms and conditions of insurance. Pet. App. A29. The court held that dismissal on state action grounds was not appropriate, because "state approval of one activity is not state approval of a related but distinct activity. * * * The alleged anticompetitive conduct in the present case * * * was neither a reasonable nor necessary consequence of the conduct regulated and approved by the state." *Id.* at A29-A30.

Petitioners do not challenge the principle that "state approval of one activity is not state approval of a related but distinct activity." Pet. App. A29. Instead, petitioners disagree with the court of appeals' determination that "there are truly two distinct activities at issue." H. Pet. 28. That fact-bound dispute does not warrant interlocutory review by this Court. In any event, the court of appeals' ruling on the state action issue appears to be correct. While state officials may have been aware that reinsurers favored the revised ISO forms (H. Pet. 29 n.22), petitioners do not assert that the state insurance officials knew about—let alone approved or actively supervised—the alleged reinsurance boycott that coerced dissenting primary insurers and the ISO to alter the forms. See *FTC* v. *Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2178-2179 (1992). Indeed, it is highly unlikely that state officials approved or supervised such activity, because the state insurance laws expressly prohibit coercion and boycotts. See H. Pet. 27 n.21.[13]

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[13] Petitioners correctly note (H. Pet. 27) that the state action doctrine does not require a State specifically to authorize every action that private parties might take to effectuate a state policy. See *Southern Motor Carriers Rate Conf.* v. *United States*, 471 U.S. 48, 65-65 (1985). But that principle does not imply that state approval of revised insurance forms necessarily constitutes au-

There is no merit to petitioners' assertion (H. Pet. 26) that principles of federalism require the dismissal of respondents' action. Although state regulators may "have the tools they need to deal with any alleged misconduct" (H. Pet. 27 n.21), Congress has carved out an express exception to the McCarran-Ferguson immunity for boycotts. Consequently, the attorneys general of 19 States did not misconstrue principles of federalism by bringing these consolidated antitrust actions. Cf. *Ticor Title Ins. Co.*, 112 S. Ct. at 2178.[14]

4. a. Both the court of appeals and the district court held that respondents have antitrust standing to pursue their claims against all the petitioners. Pet. App. A19-A21, A65-A69. In No. 91-1131, petitioner Winterthur Reinsurance Corp. contends that respondents lack antitrust standing to pursue claims against reinsurers.[15]

Winterthur contends (W. Pet. 11-17) that the Court should grant review to determine whether a plaintiff must satisfy all the factors discussed in *Associated Gen-*

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thorization and active supervision of a boycott that is illegal under state law.

[14] There is no reason to vacate the judgment of the court of appeals and remand for further consideration in light of *Ticor*. The question in *Ticor* was whether the "active supervision" component of the state action doctrine requires that state officials actually determine whether the particular private anticompetitive activity at issue meets the State's regulatory criteria. In this case, the court of appeals did not question petitioners' contention that the States supervised and approved the standardized forms, but instead held that "state approval of one activity is not state approval of a related but distinct activity"—*i.e.*, the conspiracy to coerce reluctant competitors to accede to petitioners' proposed terms. H. Pet. App. 26a.

[15] As an initial matter, it is not clear that Winterthur preserved this argument before the court of appeals. Winterthur states (W. Pet. 2) that it is "a domestic reinsurance company." In addressing standing, the court of appeals noted (W. Pet. App. A19) that only the "foreign reinsurer defendants press[ed] their position on this appeal." Although Winterthur contends (W. Pet. 5 n.4) that it preserved the issue in a footnote in petitioners' brief in the court of appeals, the issue was not discussed in the text of the brief or included in the list of questions presented to the court of appeals.

eral Contractors of California, Inc. v. *California State Council of Carpenters*, 459 U.S. 519 (1983), in order to have antitrust standing, and if not, what weight is to be given to each separate factor in the standing analysis. But this case presents no opportunity to consider those general questions, because the court of appeals appears to have concluded that each of the *Associated General Contractors* factors favored standing. See W. Pet. App. 15a-17a.[16]

Winterthur objects (W. Pet. 18-24) to the court of appeals' application of the *Associated General Contractors* factors to the facts of this case. In particular, Winterthur contends that respondents' injuries were not sufficiently direct to confer antitrust standing because Winterthur is a reinsurer that deals only with other insurance companies, while respondents are consumers who deal only with primary insurers. W. Pet. 19-20. But Winterthur is alleged to have conspired with primary insurers to restrict the availability of *primary* insurance to respondents. See Pet. App. A134-A135, A137-A139; California Compl. Counts 1, 3, 4. Respondents are thus consumers in the very market that the alleged boycott was intended to disrupt; they suffered directly from a reduced range of services in the market in which the alleged restraint occurred. That injury was sufficiently direct to confer antitrust standing. See generally P.

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[16] The court stated (W. Pet. App. 16a) that "almost all of the *Associated General Contractors* factors point to the presence of standing." Although that statement, standing alone, suggests that the court found at least one factor that weighed against standing, a reading of the court's entire opinion suggests that the court was referring to its findings (W. Pet. App. 15a-16a) that "[i]n the claims in which the reinsurers alone are defendants, there will be a problem of allocating the damages caused by the reinsurers as distinct from the damages caused by the primary insurers," and "a danger of duplicative recovery." The court went on to conclude, however, that "the net balance as to damages is in favor of standing." *Id.* at 16a. And the court concluded that each of the other *Associated General Contractors* factors favors standing. W. Pet. App. 15a-17a.

Areeda & H. Hovenkamp, *Antitrust Law* 365-366, 392 (Supp. 1991).[17]

Respondents' position is similar to that of Carol McCready in *Blue Shield* v. *McCready*, 457 U.S. 465 (1982). In *McCready*, an insurer allegedly conspired with psychiatrists to deny insurance reimbursement to subscribers who received psychotherapy from psychologists. The direct targets of the boycott were the psychiatrists' competitors, the psychologists. But the Court held that consumers of insurance such as McCready had standing to sue under the antitrust laws. Just as the boycott in *McCready* made the services of psychologists (and health insurance to pay for those services) unavailable to consumers, so the alleged reinsurance boycott in this case made desired forms of insurance unavailable to consumers such as the plaintiffs. See 457 U.S. at 478-480.

Winterthur observes (W. Pet. 20-21) that if the reinsurers had engaged in a price-fixing conspiracy, the indirect purchaser rule of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), would bar respondents' claims, and argues that the Court should extend the indirect purchaser rule to the victims of boycotts. *Illinois Brick*, however, concerned alleged horizontal price-fixing one step removed in the distribution chain from the consumer plaintiffs. In contrast, the antitrust violation alleged in this case is a two-level conspiracy to affect the terms on which primary insurers will sell insurance to consumers. For antitrust standing purposes, it is therefore more closely analogous to resale price maintenance than to horizontal

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[17] Winterthur argues (W. Pet. 20-21) that respondents have not alleged an antitrust injury. No other petitioner raises that argument, and it merits no further review. Respondents allege that Winterthur conspired with primary insurers to engage in a reinsurance boycott that had the purpose and effect of limiting the types of primary insurance that are available to respondents. Respondents have thus alleged an adverse effect on competition of the kind that the antitrust laws are intended to prevent. Winterthur also faults the court of appeals for considering defendants' intent to harm the plaintiffs. See W. Pet. 18-19. But the Court has recognized that intent is relevant to the standing inquiry. See *Associated General Contractors*, 459 U.S. at 537 & n.35.

price-fixing. As leading commentators have recognized, *Illinois Brick* has little application in such cases. "Although the [reinsurer] did not sell directly to the consumer, [it] is a fellow conspirator with the direct-selling [primary insurer] and therefore jointly and severally liable * * * for the consumer's injury." P. Areeda & H. Hovenkamp, *supra*, ¶ 337.2e, at 404.

Moreover, the Court concluded in *McCready* that the problems of duplicative recovery and apportionment of damages at issue in *Illinois Brick* did not arise in the context of the *McCready* boycott. 457 U.S. at 474-475. This case, like *McCready*, does not appear to present a "risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws." *Ibid.* Respondents' alleged injury consists of incurring costs not covered by insurance, or paying excessive amounts to obtain insurance coverage. Although the coerced primary insurers might also bring an antitrust suit, they presumably would allege a different type of injury, namely decreased sales of primary insurance as a result of the reinsurance boycott.

b. In No. 91-1146, a group of London reinsurers (the Unionamerica petitioners) contends that respondents lack antitrust standing to pursue certain claims directed solely against foreign reinsurers and unnamed co-conspirators. The Unionamerica petitioners argue (U. Pet. 10-15) that the court of appeals erred by treating antitrust injury as an element of the antitrust standing inquiry. As a result, petitioners contend (U. Pet. 10), "the Ninth Circuit has created a balancing test that permits a plaintiff showing antitrust injury to sue without establishing directness—and, conversely, a directly injured plaintiff to sue without establishing antitrust injury." But petitioners do not contend that respondents have failed to allege an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). See U. Pet. 14 (petitioners' standing "motion did not raise the *Brunswick* antitrust injury

issue"). Moreover, the court of appeals expressly found that "[t]he injury alleged was direct." Pet. App. A20. Consequently, the court of appeals would not have reached a different result if it had considered antitrust injury separately from antitrust standing.[18]

The Unionamerica petitioners also contend (U. Pet. 15-21) that the disputed counts of the complaints do not allege a sufficiently direct antitrust injury to confer antitrust standing. According to petitioners, the disputed counts allege only an agreement among foreign reinsurers, and respondents did not buy anything from the foreign reinsurers. In fact, the disputed counts of the complaints allege an agreement not only among foreign reinsurers, but also including "unnamed co-conspirators." Pet. App. A141-A147. In addition, the complaints allege an intent to affect the availability of primary insurance to respondents. *Ibid.* Consequently, the Unionamerica petitioners are not in a materially better position than Winterthur to dispute plaintiffs' standing. Nor, in light of *McCready*, is there merit to their version of the argument that the indirect purchaser rule of *Illinois Brick* should be applied mechanically to customers in markets that are the focus of a boycott.

5. The petitioners in No. 91-1128 (the Merrett petitioners) trade in reinsurance on the Lloyds of London market. They contend that principles of comity require the dismissal of some of the counts against them. They do not contend that comity shields them from respondents' allegations that they conspired with primary insurers in the United States to deny reinsurance to other primary insurers who refused to alter the terms of CGL insurance. Pet. App. A135-A140, A186-A190, A195-A196. Instead, the Merrett petitioners contend that comity requires

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[18] Excluding antitrust injury from the antitrust standing inquiry plainly would not have altered the court's views as to the directness of alleged injury. Moreover, although the court accorded "tremendous significance" to the nature of the alleged injury, it also found that other *Associated General Contractors* factors also "point to the presence of standing against all of the defendants." Pet. App. A20, A21. See note 10, *supra*.

the dismissal of three counts in which they are alleged to have conspired with unnamed co-conspirators to deny reinsurance to primary insurers in the United States until those insurers adopted the proposed changes to their primary insurance policies. See California Compl. Counts 5, 6, and 8. Pet. App. A141-A147.

Both the court of appeals and the district court analyzed the comity issue under the balancing test of *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976). The district court concluded that dismissal of the disputed counts was appropriate because "the conflict with English law and policy which would result from the extra-territorial application of the antitrust laws in this case is not outweighed by other factors." Pet. App. A81. The court of appeals reversed the district court because it concluded that "every other factor" except the conflict with British law and policy weighed in favor of jurisdiction. Pet. App. A32-A35.

Although petitioners contend (M. Pet. 12-18) that the courts of appeals have taken a variety of approaches in analyzing questions of comity, they do not contend that another court of appeals applying a different test would have reached a different result in this case. Indeed, petitioners do not object to the Ninth Circuit's *Timberlane* test, which they regard as "the most enlightened application of principles of international law to questions of jurisdiction under U.S. economic legislation." M. Pet. 3. Accordingly, this case does not present the question whether the *Timberlane* test, or some other test, states the appropriate standard for analyzing questions of comity.

Petitioners' principal complaint is that the Ninth Circuit has misapplied its own *Timberlane* test. Even if that were true, it would not ordinarily warrant review by this Court. But in any event, we think that the result the court of appeals reached under *Timberlane* is reasonable. The court recognized that application of the federal antitrust laws in this context is inconsistent with British law and policy, and that "[s]uch a conflict, unless outweighed by other factors, would by itself be reason to

decline exercise of jurisdiction." Pet. App. A32.[19] But the court concluded that the conflict was outweighed by other factors: the substantial and foreseeable adverse effects on the United States, where the defendants do at least half their casualty underwriting; the alleged intent of the defendants to harm commerce in the United States; the fact that several of the petitioners are wholly owned subsidiaries of United States corporations; the fact that, regardless of the ruling on comity, the foreign firms will remain as defendants as to other counts of the complaints; and the ability of a United States court to grant effective relief by awarding damages payable from the defendants' assets in the United States or by issuing an injunction directed only at U.S. defendants. Pet. App. A33-A35. There is no reason for this Court to review that fact-specific analysis by the court of appeals at this juncture.

Finally, petitioners object (M. Pet. 22-24) to the court of appeals' comments concerning the relationship between *Timberlane* and the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a.[20] The court of appeals stated:

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[19] In its brief as *amicus curiae* submitted in support of the Merrett petitioners, the United Kingdom states (U.K. Br. 9) that "the conflict in this case arises because plaintiffs ask the U.S. courts to place restrictions on the British industry which is operating under the British regulatory and competition regime," and to hold British nationals liable for conduct that does not violate British law. But neither the United Kingdom nor the Merrett petitioners contend that British policy compelled or encouraged the alleged reinsurance boycott, or that petitioners could not have complied with both American and British law. Moreover, British courts have recognized that British subjects who violate American antitrust laws may be subject to the jurisdiction of American courts in certain circumstances. See *Midland Bank Plc.* v. *Laker Airways Ltd.*, [1986] 2 W.L.R. 707 (C.A.).

[20] The FTAIA provides in relevant part that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless * * * such conduct has a direct, substantial, and reasonably foreseeable effect * * * on trade or commerce which is not trade or commerce with foreign nations." 15 U.S.C. 6a.

> We do not believe a *Timberlane* analysis * * * can be unaffected by the statute. If a complaint survives the new bar of 15 U.S.C. § 6a because the conduct has a "direct, substantial, and reasonabl[y] foreseeable effect" on American commerce, it is only in an unusual case that comity will require abstention from the exercise of jurisdiction. But as the legislation does not eliminate comity, a court should look to see if the case before it is one in which comity still has a role to play.

M. Pet. App. A28. Petitioners do not claim that jurisdiction in this case is barred by the FTAIA. Nor do they assert that the court of appeals' comments concerning the FTAIA conflict with any decision of this Court or another court of appeals. In any event, the court's suggestion that the FTAIA may affect the *Timberlane* analysis was dicta, because the court concluded that the *Timberlane* analysis, quite apart from the FTAIA, required it to exercise jurisdiction. Pet. App. A32-A35.[21]

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[21] The court of appeals referred (H. Pet. App. 32a) to "the weight of the *findings* already made under the [FTAIA]" (emphasis added). But that statement referred only to the district court's findings that "the alleged agreement * * * concerned the provision of reinsurance within the United States," and that "the allegations of effects in United States markets are sufficient to preclude a characterization of wholly foreign commerce." H. Pet. App. 27a.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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SUPPLEMENTAL MEMORANDUM FOR PETITIONER PURSUANT TO RULE 15.7

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Petitioner, Winterthur Reinsurance Corp. of America ("Winterthur"), respectfully submits this supplemental memorandum in response to the brief filed by the Solicitor General as *amicus curiae* on behalf of the United States.

1. *What Antitrust Standing Test Did The Ninth Circuit Apply?* The Ninth Circuit's ruling on antitrust standing in this case is as confused as the general state of antitrust standing law in the lower courts. In its decision, the Ninth Circuit explicitly states that plaintiffs have standing to sue because "[a]lmost all of the *Associated General Contractors* factors" are satisfied. Winterthur Pet. App. 16a. Needless to say, if the antitrust standing test established by *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), requires a plaintiff to satisfy *all* the

standing factors set forth therein, it is not enough for a plaintiff merely to satisfy "almost" all of these factors. Winterthur has sought certiorari in this case, *inter alia*, to allow this Court to clarify whether a plaintiff must satisfy *all* of the *Associated General Contractors* factors to have standing.

As set forth in Winterthur's petition (Winterthur Pet. 11-18), there is considerable confusion in the lower courts regarding the proper application of the *Associated General Contractors* test. The Solicitor General does not suggest otherwise. Instead, the Solicitor General argues that this Court should not attempt to clarify the scope of *Associated General Contractors* in this case, because "the court of appeals *appears* to have concluded that each of the *Associated General Contractors* factors favored standing." U.S. Br. 19 (emphasis added). According to the Solicitor General, the Ninth Circuit's statement that "almost all" the *Associated General Contractors* factors were met should not be accepted at face value.[1] *Id.* at n.16.

As the Solicitor General appears to recognize, the Ninth Circuit's standing analysis is not a model of clarity. Unfortunately, antitrust standing analysis in the lower courts is too often plagued by inconsistencies of this sort.

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[1] Specifically, the Solicitor General acknowledges that, "standing alone," the above-cited statement by the Ninth Circuit indicates that not all the *Associated General Contractors* factors were met. U.S. Br. 19 n.16. Nevertheless, the Solicitor General "suggests" that the Ninth Circuit was merely referring to "findings" as to the complexity of damages and the risk of duplicative recovery, and that by concluding that "the net balance as to damages is in favor of standing," the Ninth Circuit in essence found that *all* factors were met. *Id.* Yet "damages" is not a single factor; rather, it describes several of the distinct *Associated General Contractors* factors (complexity; speculativeness; duplicativeness). Even if the Solicitor General were correct in his interpretation of the Ninth Circuit's ruling, the fact that the "net balance" of *all* damage factors favors standing does *not* mean that *all* the *Associated General Contractors* factors have in fact been met.

That is precisely why this Court should grant certiorari. In the nine years since *Associated General Contractors* was decided, the lower courts have failed to come to any consensus as to how the *Associated General Contractors* standing test should be applied. This Court should not forgo this opportunity to ensure that the lower courts properly apply the analytical framework set forth in *Associated General Contractors*. The Solicitor General's attempted reconciliation of the internal inconsistencies in the Ninth Circuit's analysis should not be the basis for denying certiorari.[2]

2. *This Case Is Not Controlled By This Court's Decision In The McCready Case.* The Solicitor General also argues that certiorari should be denied because plaintiffs' position in this case is comparable to the position of the plaintiff who was granted standing in *Blue Shield of Va.* v. *McCready*, 457 U.S. 465 (1982). This is simply not so. In *McCready*, the plaintiff had standing to sue Blue Shield because she was *directly* injured by Blue Shield's refusal to reimburse *her* for payments that she had made to her psychologist. There was no other direct victim in the *McCready* case. As the *McCready* Court expressly ruled, the plaintiff's psychologist (the alleged "target" of the Blue Shield boycott) could assert "no claim of injury," because the psychologist had been "fully paid" by the plaintiff and was *not* affected by Blue Shield's refusal to reimburse the plaintiff. *Id.* at 475.

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[2] In another footnote, the Solicitor General also suggests that "it is not clear" that Winterthur preserved its standing arguments on appeal, since the standing issue was addressed in a footnote rather than in the text of petitioners' brief in the court of appeals. U.S. Br. 18 n.15. Yet, as the Solicitor General concedes, the court of appeals in fact decided the supposedly unpresented issue—"the plaintiffs have standing to maintain this antitrust suit against *all* defendants." Winterthur Pet. App. 17a (emphasis added). Moreover, as noted in its Petition for Certiorari, Winterthur also filed a separate, independent joinder to the petition for rehearing in the court of appeals that expressly raised the standing issue. Winterthur Pet. 5-6 n.4.

In short, in *McCready*, the plaintiff clearly suffered a direct injury; the other potential plaintiff (her psychologist) suffered no such injury. The facts of *McCready* are a far cry from the facts of this case, where "the action of the reinsurers took effect through the primary insurers" (Winterthur Pet. App. 15a), and where the alleged *direct* victims (*i.e.*, the primary insurers) could sue if they were so inclined.[3]

3. *Plaintiffs' Alleged Injuries Were Not Direct.* It is undisputed that Winterthur never sold (or refused to sell) insurance to plaintiffs or other consumers. Winterthur sold reinsurance only to other insurers. Nevertheless, the Solicitor General argues that plaintiffs should have standing to sue Winterthur because Winterthur and other reinsurers allegedly conspired with four *primary* insurers, who sell directly to consumers. In the Solicitor General's view, the allegation that four primary insurers conspired with Winterthur and other reinsurers makes this case "analogous to resale price maintenance" cases—where consumers have been granted standing to sue both the dealer from whom they purchased and the manufacturer who engaged in the vertical price-fixing conspiracy with the direct-selling dealer. U.S. Br. 20-21.

The Solicitor General's characterization of the case, however, cannot withstand analysis. Plaintiffs do *not* allege that Winterthur conspired with each primary insurer who sold (or refused to sell) to plaintiffs. Far from it. There are over 1400 primary insurers nationwide. See U.S. Br. 2. Only four of these primary insurers are

[3] Thus, the risk of duplicative recovery was not present in *McCready*. Here, however, that risk is clearly present, since non-defendant primary insurers might well file suit. The Solicitor General, acknowledging the risk that primary insurers might also sue, seeks to minimize this risk by speculating that primary insurers "presumably would allege a different type of injury." U.S. Br. 21. In fact, it is more likely that primary insurers would allege exactly the same type of injury as insurance consumers—*i.e.*, that the alleged conspiracy made it impossible or more costly to obtain the insurance product they wanted.

alleged to have conspired with Winterthur; the remainder were allegedly the *victims* of this purported conspiracy. According to plaintiffs' allegations, the four defendant primary insurers induced Winterthur (and other reinsurers) to refuse to offer reinsurance to the 1400 nonconspiring primary insurers.

Thus, Winterthur's alleged misconduct consists of its refusal—induced by the defendant primary insurers—to sell *reinsurance* to the nondefendant primary insurers. None of the primary insurers is alleged to have participated in a "vertical conspiracy" that is analogous to a "resale price maintenance" scheme. The 1400 nondefendant primary insurers are alleged victims, not conspirators; they—not plaintiffs—suffered the most direct alleged injury. As a result, the problems of complex damage apportionment and the risks of duplicative recoveries are present notwithstanding the allegations that four of the primary insurers induced the alleged refusal to sell reinsurance.

Indeed, even the four defendant primary insurers are not in the same position as a direct-selling dealer in a vertical price-fixing case. Plaintiffs' allegation is *not* that the reinsurers induced the four defendant primary insurers to refuse to offer insurance policies to consumers; rather, plaintiffs' allegation is that the four defendant primary insurers induced the reinsurers to refuse to offer reinsurance to other primary insurers. There is simply no vertical link between the reinsurers and the consumer plaintiffs.

By the same token, plaintiffs should not be able to create standing simply by alleging that Winterthur's refusal to sell reinsurance was "intended to disrupt" the primary insurance market. U.S. Br. 19. Intent alone is insufficient as a matter of law to create standing, even when combined with a claim of consequential harm flowing from an alleged antitrust violation. *See, e.g., Associated General Contractors*, 459 U.S. at 545. Moreover, the fact that a refusal to sell in one market has reper-

cussions in an adjacent market cannot suffice to confer standing upon all consumers in the adjacent market. See Winterthur Pet. 23-24. When all is said and done, plaintiffs are still consumers of primary insurance, and Winterthur and other reinsurers are still sellers *only* of reinsurance. Plaintiffs are *not* consumers of the product sold by reinsurers; any injury suffered by them is by definition an "indirect" injury.

* * * *

In the final analysis, it remains undisputed that the *Associated General Contractors* test for antitrust standing is currently being applied in divergent ways by the lower courts. This case presents an opportunity for this Court to eliminate the confusion that is reflected in the lower courts' application of that test. Winterthur respectfully submits that its petition for certiorari should be granted.

Respectfully submitted,

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Petitioner, Winterthur Reinsurance Corp. of America ("Winterthur"), respectfully submits this supplemental memorandum to address the significance to Winterthur's Petition of Respondents' Brief, filed on December 23, 1992, in Nos. 91-1111 and 91-1128 ("Resp. 91-1111 Br.").

Respondents' 91-1111 Brief demonstrates that they lack antitrust standing to challenge the purported conduct on which respondents argue that they rely to avoid the McCarran-Ferguson Act. Petitioners' Brief in 91-1111 and 91-1128 demonstrated that the complaints challenge only an agreement on the terms of insurance, which is protected by the McCarran-Ferguson Act. Respondents

try to avoid that defect by recharacterizing the complaints as alleging acts of boycott, coercion or intimidation more broadly restrictive of competition. But, by expressly asserting that the purported acts of boycott, coercion or intimidation were directed against nondefendant primary insurers, respondents implicitly concede their lack of standing.

Respondents claim that, "[r]educed to essentials, the complaints allege that the defendant primary insurers enlisted reinsurers 'to compel capitulation' by competing primary insurers to the defendants' demands." (Resp. 91-1111 Br. 2.) For reasons reviewed in Petitioner's Briefs in Nos. 91-1111 and 91-1128, respondents' characterization of their complaints is ineffective to avoid the McCarran-Ferguson Act. Simply put, they have not alleged a collective refusal to deal with the nondefendant primary insurers on any terms or to discriminate between favored and disfavored entities in the provision of insurance. Only such allegations are sufficient to state a violation under the McCarran-Ferguson Act, but even then only the boycotted or disadvantaged primary insurer can challenge that violation. The alleged anticompetitive conduct in such a boycott is directed at obtaining the capitulation of these nondefendant (and nonconspirator) primary insurers. Accordingly, such conduct could injure respondents, as customers of such primary insurers, only indirectly.

Respondents' own statement of their claim refutes the court of appeals' summary conclusion that respondents suffered a "direct injury." Respondents' Brief expressly asserts that the nondefendant primary insurers, not plaintiffs, were "the direct target of the boycott." (*Id.* at 29 n.32.) Each description of the alleged conspiracy confirms that any alleged anticompetitive conduct was directed at these non-conspiring primary insurers. (*See, e.g., id.* at 13 ("The complaints allege that defendants combined to compel competing insurers to sell only those insurance prod-

ucts approved by the cartel"); 15 (complaints "allege conduct to force non-conspiring insurers to adhere to cartel terms"); 16 ("defendants combined to force competitors [*i.e.*, the nondefendant primary insurers] to adhere to their cartel's demands").) Straining to read their complaints as alleging much more than an agreement on insurance terms, respondents assert that they alleged "concerted refusals to deal designed to prevent firms from competing effectively." (*Id.* at 18; *see also id.* at 21 ("the reinsurers conspired to refuse to deal with insurers in the United States who offered the insurance products primary insurers wanted to ban").)

If the complaints are viewed, as plaintiffs contend, to allege such a concerted refusal to deal designed to prevent the boycotted firms from competing effectively, they fail to state a claim for which respondents have standing. Only the boycotted firms' injury is direct for antitrust standing purposes. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 541 (1983). The boycotted firms therefore have a right to maintain a treble-damage action against the defendants. *Id.* Any injury suffered by the customers of the boycotted firms, such as respondents, is indirect and speculative and any recovery therefore necessarily poses a danger of duplicative recovery. In these circumstances, respondents' indirect harm is insufficient to confer standing notwithstanding allegations that defendants intended to cause them harm. *Id.* at 537, 545.

* * * * *

Respondents have sought to navigate this case between the Scylla of the McCarran-Ferguson Act and the Charybdis of antitrust standing, either of which is fatal. Respondents crafted their complaints to steer as far away as they could from the antitrust standing bar by alleging simply an agreement on the terms of insurance. These allegations minimize the directness of the harm suffered

by the nondefendant primary insurers and the consequent indirectness of respondents' harm, which are the most significant factors denying respondents' standing. However, now that respondents are more threatened by the McCarran-Ferguson Act as a result of the Court's grant of certiorari on those issues, they characterize their case as a boycott of the nonconspiring primary insurers. That characterization, if accepted, runs foursquare into antitrust standing. Accordingly, if this Court, in Nos. 91-1111 and 91-1128, were to find that the complaints alleged conduct of boycott or coercion outside the protection of the McCarran-Ferguson Act, it should grant Winterthur's Petition for Certiorari and resolve the standing issue for reasons described more fully in the Petition and in Winterthur's reply and supplemental briefs.

Respectfully submitted,

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